89-2026

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. and ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC.,

Petitioners,

vs.

ROBERT ABRAMS, Attorney General of the State of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

The Magnuson-Moss Warranty Act encourages warrantors to create informal dispute resolution mechanisms. It also provides that if warrantors do so in compliance with the Act, prior resort to such a mechanism is required as a precondition to suit under the Act.

The questions presented are:

1. Whether the Magnuson-Moss Warranty Act preempts state statutes that impose mandatory procedures and remedies specifically considered and rejected by federal regulation and omitted from the federal law?

2. Whether New York may, consistent with the Supremacy Clause, prevent warrantors from operating informal consumer dispute resolution mechanisms authorized by Magnuson-Moss?

STATEMENT OF PARTIES

Petitioners are the Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") and the Association of International Automobile Manufacturers, Inc. ("AIAM"). AIAM was formerly known and designated in the record below as the Automobile Importers of America, Inc.

MVMA, a New York not-for-profit corporation, is a trade association of United States motor vehicle manufacturers. The members of the MVMA are Chrysler Corporation, Ford Motor Company, General Motors Corporation, Honda of America Mfg., Inc., Navistar International Transportation Corp., PACCAR, Inc., and Volvo North America Corporation.

AIAM, a District of Columbia not-for-profit corporation, is a trade association of manufacturers, manufacturer-authorized importers, and distributors of motor vehicles manufactured outside the United States. The members of AIAM are: American Honda Motor Co., Inc., American Suzuki Motor, BMW of North America, Inc., Hyundai Motor America, Isuzu Motors America, Inc., Maserati Automobiles Incorporated, Mazda Motor of America, Inc., Mitsubishi Motor Sales of America, Inc., Nissan Motor Corporation in USA, Peugeot Motors of America, Inc., Porche Cars North America, Inc., Regie Nationale Des Usines Renault, Rolls-Royce Motor Cars Inc., Rover Group USA, Inc., Subaru of America, Inc., Toyota Motor Sales USA, Inc., and Volvo North America Corporation.

The members of MVMA and AIAM collectively have hundreds of parent companies and subsidiaries. Because the individual members were not parties below and are not petitioners herein, all of these related companies have not been separately listed pursuant to Rule 29.1. Very few of these affiliated companies have issued shares to the public in the United States. It is very unlikely that any member of this Court would have an interest in any of these companies. At the Court's request, MVMA and AIAM will undertake to compile and to provide a list of its members' affiliated corporations.

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No.

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MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. and ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC.,

Petitioners,

vs.

ROBERT ABRAMS, Attorney General of the State of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Motor Vehicle Manufacturers Association of the United States, Inc. and the Association of International Automobile Manufacturers, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Court of Appeals decision (A-1-17 *infra*) is reported as *Motor Vehicle Manufacturers Association of the United States, Inc. v. Abrams,* 899 F.2d 1315 (2d Cir. 1990).

The Court of Appeals reversed the District Court decision (A-18-51 *infra*) reported as *Motor Vehicle Manufacturers*

Association of the United States, Inc. v. Abrams, 697 F. Supp. 726 (S.D.N.Y. 1988).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 26, 1990.

The Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, § 2.

The statutory provisions involved in this case are 15 U.S.C. §§ 2301-2311 and N.Y. Gen. Bus. Law § 198-a (App. C-1, A-52-61 *infra* and C-3, A-75-83 *infra*). The relevant federal regulations, 16 C.F.R. Part 703, are at App. C-2, A-62-74 *infra.*

STATEMENT OF THE CASE

This case presents the Court with an opportunity to resolve a conflict among the circuits regarding whether a state may interfere with federal rights granted to warrantors in a comprehensive federal legislative and regulatory scheme pursuant to

the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2311 ("Magnuson-Moss" or the "Act").

The Magnuson-Moss Act

Magnuson-Moss was enacted in 1975, seven years before passage of the first state "lemon law" regulating new motor vehicle warranties. Its manifest purpose is "to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms." 15 U.S.C. § 2310(a)(1). Congress delegated to the Federal Trade Commission ("FTC") the responsibility to "prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty . . ." 15 U.S.C. § 2310(a)(2).

If a voluntary mechanism meets the minimum federal standards, the Act and regulations confer upon warrantors the right to require resort to that dispute resolution process as a condition precedent to maintaining a civil suit under the Act. 15 U.S.C. § 2310(a)(3); 16 C.F.R. § 703.2(b)(3). While Congress directed the FTC to develop minimum standards for warranty dispute resolution mechanisms, it granted warrantors the essential flexibility to adopt competing mechanisms that have additional features. A statutory and regulatory *quid pro quo* was thus federally prescribed: if a warrantor chooses to establish a mechanism which complies with federal law, it has the absolute right to require its exhaustion, without regard to state law, before a consumer may sue under the Act.

This federally mandated flexibility and the prior resort right were deemed necessary incentives to warrantors to "permit a wide variation in form and procedures among complying mechanimss" and "to avoid creating artificial or unnecessary procedural burdens" in the informal dispute resolution process. FTC Statement of Basis and Purpose, 40 Fed. Reg. 60168, 60193 (1975) [hereinafter "FTC Statement"]. The Commission

also sought to ensure that mechanisms would operate "at cost levels acceptable to warrantors." *Id.*

Specifically, the FTC considered and expressly reject mandatory oral hearings, prescribed remedies, and other rigid requirements. The Commission correctly predicted that such invariable rules "would make it impossible for these mechanisms to achieve the expeditious settlement of disputes" required by the Act. *Id.* at 60209 (quoting FTC Staff Report); 16 C.F.R. § 703.5(f) (optional hearings); § 703.6 (record keeping); § 703.5(j) (non-binding decisions); § 703.4(c) (non-professional staff); § 703.5(d)(1) (no prescribed or mandatory remedies).

Thus, the federal government has decided, by rejection of these mandatory procedures and remedies, that warrantors have the right to design flexible mechanisms "which suit their particular commercial needs and complaint handling patterns," FTC Statement at 60202 (quoting FTC Staff Report), and to permit variations in procedures among competing warrantors to foster greater competition in the marketplace. *Id.* at 60193.

Many members of the MVMA and AIAM, relying upon this comprehensive nationwide federal scheme, have used informal dispute resolution mechanisms. Ford and Chrysler operated company-specific arbitration boards. Other manufacturers, exercising the flexibility legislated by Congress, have participated in resolution programs for automobile warranty disputes offered by the Better Business Bureau, the American Automobile Association, and the National Automobile Dealers Association.

New York's Amended Lemon Law

The original New York Lemon Law did not contradict the Act's provisions regarding informal dispute mechanisms, and in fact expressly conformed to Magnuson-Moss. 1983 N.Y. Laws c. 444 § 1; *see* N.Y. Gen. Bus. Law § 198-a(g) note (1988). In 1986, however, New York amended its Lemon Law to require MVMA and AIAM members to incorporate into their dispute

resolution mechanisms the mandatory features which Congress and the FTC specifically considered and declined to mandate. These amendments were enacted for the avowed purpose of improving upon and correcting perceived defects in the federal statute. A-4 *infra;* C.A. App. 302-09. The New York law requires that: 1. mechanism decisions be binding on the manufacturer, but not the consumer, N.Y. Gen. Bus. Law § 198-a(h); 2. mechanisms have mandatory oral hearings, *Id.*, § (m)(1)(i); 3. additional recordkeeping and detailed statistics on individual disputes be maintained, *Id.*, § (m)(3); 4. mechanism staff receive professional training in arbitration and in the New York law, *Id.*, § (m)(1)(i); and 5. only those remedies permitted and established in the statute may be granted. *Id.*, § (m)(1)(iii).

Proceedings Below

Shortly after these 1986 amendments were adopted, Petitioners sought a declaratory judgment that the 1986 amendments impermissibly deprive warrantors of their Magnuson-Moss right to incorporate into their warranties informal dispute resolution mechanisms that complied with the Act without conforming to the conflicting requirements of New York law. MVMA and AIAM averred that the Act and its implementing regulations preempt the contradictory New York 1986 amendments.[1] The District Court found that the 1986 amendments were preempted by the Act because the state statute "directly conflict[s] with explicit provisions of federal law." A-39 *infra.*

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[1] Petitioners also sought declaratory judgments that various provisions of the 1986 amendments imposed impermissible burdens on interstate commerce in violation of the Commerce Clause and imposed prior restraints on speech in violation of the First Amendment. These claims were adjudicated by separate motions for partial summary judgment and are not at issue in this Petition. *Motor Vehicle Manufacturers Assocation of the United States, Inc. v. Abrams,* 720 F. Supp. 284 (S.D.N.Y. 1989) [Commerce Clause]; *Motor Vehicle Manufacturers Association of the United States, Inc. v. Abrams,* 685 F. Supp. 804 (S.D.N.Y. 1988) [First Amendment].

It correctly held that the state statute impermissibly "depriv[es] manufacturers of their federally granted right to incorporate into their warranties and require the use of any mechanism that complies with the F.T.C.'s minimum standards." A-44 *infra*. Respondent appealed this decision.

The Second Circuit reversed, holding that the Act and its regulations do not confer any " 'right' . . . to operate a mechanism in New York that does not comply with the Lemon Law Amendments" and that "the federal regulatory scheme is [not] meant to be exclusive." A-15 *infra*.

REASONS FOR ISSUANCE OF THE WRIT

A. The Writ Should Issue To Resolve A Conflict Among The Circuits Regarding The Preemptive Effect Of The Magnuson-Moss Warranty Act With Respect To Informal Consumer Dispute Resolution Mechanisms

Although it reversed the well-reasoned decision of the District Court, the Court of Appeals conceded that the Act "is [not] crystal clear on the issue of preemption." A-11 *infra.* It also acknowledged the "conflicting authority" from other circuits on the issue. A-10 *infra.* The opinion below is contrary to the Fourth Circuit's holding that state laws concerning automobile manufacturers' informal dispute resolution mechanisms are preempted under the Act. The Fifth Circuit has also expressed support for this position.

In light of the widespread enactment of lemon laws by the states and the need for warrantors to have clear guidance as to whether Magnuson-Moss remains the nationwide framework for consumer warranties intended by Congress, review by this Court is warranted.

1. The Circuits That Have Considered The Issue Are Divided

The Court of Appeals did not dispute that under the Supremacy Clause federal legislation and its attendant implementing regulations may impliedly preempt complementary state regulation. A-6 *infra; see e.g., Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 299-300 (1988). Magnuson-Moss and the FTC's regulations have preemptive effect if they evince an intent to occupy the field regulated. *Schneidewind,* 485 U.S. at 300; A-6 *infra.* However, the four circuits that have applied these established principles to the issue of state power to regulate Magnuson-Moss dispute resolution mechanisms are divided on the question.

In *Chrysler Corp. v. Texas Motor Vehicle Comm.,* 755 F.2d 1192, 1206 (5th Cir. 1985), the court ruled that a Texas law per-

mitting the state's Motor Vehicle Commission to resolve warranty disputes prior to judicial action was not preempted by Magnuson-Moss. The Fifth Circuit stated that under the Supremacy Clause a state law purporting to regulate *private* dispute resolution mechanisms (as the New York law does) *is* superseded by Magnuson-Moss: "[T]he preclusive effect of section 110 [15 U.S.C. § 2310] is limited to rules governing informal dispute resolution procedures created by private warrantors. . . ." *Id.*

The Fourth Circuit reached the same conclusion in *Wolf v. Ford Motor Co.*, 829 F.2d 1277, 1279-80 (4th Cir. 1987), affirming a District Court decision that Virginia law otherwise applicable to the regulation of informal dispute mechanisms was preempted under the Supremacy Clause by Magnuson-Moss. The court based its conclusion upon "the pervasive nature of the federal regulatory scheme and . . . the conflict that would result" if fraud claims under the state law "were allowed." 829 F.2d at 1279. Upon examination of the Act and regulations, the Court of Appeals concluded "[t]he FTC regulations are extensive and address all facets of the mechanisms' operation. *They leave no room for state regulation.*" *Id.* (footnote omitted; emphasis added).

In contrast, the Eighth Circuit has rules that the Supremacy Clause does not prohibit Minnesota's regulation of warrantors' dispute resolution mechanisms. *Automobile Importers of America, Inc. v. Minnesota,* 871 F.2d 717, 721-22 (8th Cir.), *cert. denied,* 110 S. Ct. 201 (1989).

The New York statute critically differs from the Minnesota law. Minnesota does not contradict Magnuson-Moss by prescribing the remedies that mechanisms can impose, nor does Minnesota mandate binding arbitration in express violation of the federal statute. Minn. Stat. § 325F.665. Minnesota *requires* motor vehicle manufacturers to establish Magnuson-Moss mechanisms despite the federal determination that such mech-

anisms be voluntary. New York, in contrast, has created a parallel regulatory scheme that gives warrantors the option either to submit to state law in lieu of Congress' framework or to forego creating mechanisms of any kind. A-13 *infra*.

While the specific state laws at issue in *Wolf, Texas Motor Vehicle Commission, Automobile Importers of America,* and the decision below are dissimilar, each circuit was called upon to decide whether states may interfere in the area of Magnuson-Moss pre-judicial dispute resolution mechanisms. The disagreement among the circuits and the resulting uncertainty concerning the Act require resolution by this Court.

As matters now stand, ten legislatures in the Second and Eighth Circuits are free to enact legislation altering or contradicting Magnuson-Moss' nationwide regulatory scheme governing informal dispute mechanisms. In contrast, five states in the Fourth Circuit are constrained from doing so and the three states comprising the Fifth Circuit have been given a clear indication that such laws would violate the Supremacy Clause. For the rest of the country there is, at best, uncertainty.

2. The Question Of State Regulation Of Magnuson-Moss Warranty Mechanisms Is Of General Importance

The Second Circuit's decision permits states to nullify federal laws under the guise of "improving" national legislative and regulatory decisions made by Congress or its delegates. Aside from the resulting mischief this misinterpretation of the Supremacy Clause invites, the specific issue of states' ability to legislate in the area of informal dispute mechanisms is an important question of federal law. States are enacting and revising Lemon Laws with increasing frequency. In the first two years after Connecticut passed the first Lemon Law in 1982, thirty-two other states enacted such laws. Coffinberger & Samuels, *Legislative Responses to the Plight of New Car Purchasers,* 18 U.C.C. L.J. 168, 175 (1985). This first wave of state legislation,

like the New York statute prior to its 1986 amendment, respected the Magnuson-Moss dispute resolution mechanism framework and expressly reaffirmed its applicability as implemented by the FTC. *Id.* at 176.

The New York amendments, however, represent a conscious attempt to overstep the boundary delineated by Congress and rewrite the federal law of informal dispute resolution enacted in 1975. The forty-nine jurisdictions with Lemon Laws[2] are conti-

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[2] With the exception of Arkansas and South Dakota, all of the states (and the District of Columbia) have Lemon Laws. Act of April 18, 1990, 1990 Ala. Laws Act 90-479 (effective July 1, 1990); Alaska Stat. §§ 45.45.300-.360 (1986); Ariz. Rev. Stat. Ann. §§ 44-1261 to -1265 (1987 & Supp. 1989); Cal. Bus. & Prof. Code §§ 9889.70 -.76 (West Supp. 1990), Cal. Civ. Code §§ 1793.2 to 1794 (West 1985 & Supp. 1990), Cal. Veh. Code § 3016 (West 1987 & Supp. 1990); Colo. Rev. Stat. §§ 42-12-101 to -107 (1984 & Supp. 1989); Conn. Gen. Stat. §§ 42-179 to -186 (1989) *amended by* Act of April 16, 1990, 1990 Conn. Legis. Serv. P.A. 90-8 (West) (effective April 16, 1990); Del. Code Ann. tit. 6, §§ 5001-5009 (Supp. 1988); D.C. Code Ann. §§ 40-1301 to -1309 (1986 & Supp. 1989); Fla. Stat. Ann. § 681.10-.118 (West Supp. 1990); Act of April 10, 1990, 1990 Ga. Laws 1245 (effective January 1, 1991); Haw. Rev. Stat. §§ 490:2-313.1 to :2-313.2 (1985 & Supp. 1989); Idaho Code §§ 48-902 to -909 (Supp. 1990) *amended by* Act of April 5, 1990, 1990 Idaho Sess. Laws c. 235 (effective April 5, 1990); Ill. Rev. Stat. ch. 121½, para. 1201-1208 (Smith-Hurd Supp. 1989); Ind. Code Ann. § 24-5-13 (Burns Supp. 1990) *amended by* Act of March 20, 1990, 1990 Ind. Acts P.L. 141-1990 (effective September 1, 1990); Iowa Code Ann. § 322E.1 (West 1985 & Supp. 1990); Kan. Stat. Ann. §§ 50-645 to -646 (Supp. 1989); Ky. Rev. Stat. Ann. §§ 367.840, 367.846, 367.860-.870 (Baldwins 1983 & Supp. 1989); La. Rev. Stat. Ann. §§ 51:1941-:1948 (West 1987); Me. Rev. Stat. Ann. tit. 10, §§ 1161-1169 (Supp. 1989); Md. Com. Law Code Ann. §§ 14-1501 to -2007 (1990); Mass. Ann. Laws ch. 90, § 7N½ (1985 & Supp. 1990); Mich. Comp. Laws Ann. §§ 257.1401-1410 (West Supp. 1990); Minn. Stat. Ann. § 325F.665 (West Supp. 1990) *amended by* Act of April 6, 1990, 1990 Minn. Sess. Law Serv. 408 (West) (effective August 1, 1990); Miss. Code Ann. §§ 63-17-151 to -165 (Supp. 1988); Mo. Rev. Stat. §§ 407.560-.579 (1986); Mont. Code Ann. §§ 61-4-501 to -533 (1989); Neb. Rev. Stat. §§ 60-2701 to -2708 (1988 & Supp. 1989); Nev. Rev. Stat. §§ 598.751-.791 (1989); N.H. Rev. Stat. Ann. §§ 357-C:3 to -D:8 (1984 & Supp. 1989); N.J. Stat. Ann. §§ 56:12-29 to -49 (West Supp. 1988); N.M. Stat. Ann. §§

nuing to amend their existing statutes; fifteen states did so in 1989 and eight states have already done so this year.[3] As more

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57-16A-1 to -16A-9 (1987); N.Y. Gen. Bus. Law § 198-a (Consol. Supp. 1989); N.Y. Veh. & Traf. Law § 417-a (Consol. Supp. 1989); N.C. Gen. Stat. § 20-351 to -351.10, 25-2-103 (1989); N.D. Cent. Code §§ 39-04-39.4, 51-07-16 to -22, 57-40.4-01.1 (1987 & Supp. 1989); Ohio Rev. Code Ann. §§ 1345.71-.77, 4517.60 (Anderson Supp. 1989); Okla. Stat. Ann. tit. 15, § 901 (West Supp. 1990); Or. Rev. Stat. §§ 646.315 -.375 (1988); Pa. Stat. Ann. tit. 73 §§ 1951-1963 (Purdon Supp. 1990); R.I. Gen. Laws §§ 6-13.1-18, 31-5.2-1 to -5.2-13 (1985 & Supp. 1989); S.C. Code Ann. §§ 56-28-10 to -110 (Laws. Co-op. Supp. 1989); Tenn. Code Ann. §§ 55-24-201 to -211 (1989); Tex. Rev. Civ. Stat. Ann. art. 4413(36) §§ 3.08, 4.05, 4.07, 6.07 (Vernon Supp. 1990); Utah Code Ann. §§ 13-20-1 to -7 (1986) *amended by* Act of April 23, 1990, 1990 Utah Laws ch. 249 (effective May 12, 1990); Vt. Stat. Ann. tit. 9, §§ 4170-4181 (1984 & Supp. 1989) *amended by* Act of April 30, 1990, 1990 Vt. Laws P.A. 157 (effective April 30, 1990); Va. Code Ann. §§ 59.1-207.9 to -207.16 (1987 & Supp. 1989) *amended by* Act of April 9, 1990, 1990 Va. Acts c. 772 (effective July 1, 1990); Wash. Rev. Code Ann. §§ 19.118.005-.902, 82.32.065 1989 & Supp. 1990) *amended by* Act of March 28, 1990, 1990 Wash. Legis. Serv. 239 (West) (effective June 7, 1990); W. Va. Code §§ 46A-6A-1 to -9 (1986 & Supp. 1989); Wis. Stat. Ann. §§ 218.01-.015 (West 1982 & Supp. 1989); Wyo. Stat. § 40-17-101 (Supp. 1989).

[3] The following states amended their Lemon Laws in 1989: California, 1989 Cal. Legis. Serv. c. 193, §§ 1-3, and c. 1154, § 2.5 (West); Connecticut, 1989 Conn. Acts P.A. 89-173, §§ 1-3; Idaho, 1989 Idaho Sess. Laws c. 310, § 1; Illinois, 1989 Ill. Laws P.A. 86-898, § 1; Indiana, 1989 Ind. Acts P.L. 24-1989, §§ 25-29; Kansas, 1989 Kan. Sess. Laws ch. 34, §§ 1-5, and ch. 160 §§ 1-2; Maine, 1989 Me. Legis. Sess. Laws c. 570, §§ 1-5; Minnesota, 1989 Minn. Sess. Laws c. 43, § 1; Nebraska, 1989 Neb. Laws LB 280, § 10; New York, 1989 N.Y. Laws c. 85, § 1, and c. 279, §§ 1-2; North Carolina, 1989 N.C. Sess. Laws c. 14, § 1, c. 43, § 12, and c. 519, §§ 1-2; North Dakota, 1989 N.D. Laws ch. 591, §§ 1-2, and ch. 724, § 1; Texas, 1989 Tex. Gen. Laws ch. 1130, §§ 16, 23, 34; Washington, 1989 Wash. Laws ch. 347; West Virginia, 1989 W. Va. Acts c. 35.

The following states have amended their Lemon Laws in 1990: Connecticut, 1990 Conn. Legis. Serv. P.A. 90-8 (West); Idaho, 1990 Idaho Sess. Laws c. 235, Indiana, 1990 Ind. Acts P.L. 141-1990 (effective September 1, 1990); Minnesota, 1990 Minn. Sess. Law Serv. 408 (West) (effective August 1, 1990); Utah, 1990 Utah Laws ch. 249, §§ 1-4; Vermont, 1990 Vt. Laws P.A. 157; Virginia, 1990 Va. Laws c. 772 (effective July 1, 1990); Washington, 1990 Wash. Legis. Serv. 239 (West) (effective January 1, 1991).

states follow the example of New York and create their own versions of the mechanism regulations promulgated by the FTC, a patchwork quilt of conflicting local legislation will result, frustrating Congress' intent of fostering informal mechanisms that comply with the FTC's uniform nationwide regulations. The Supremacy Clause is intended specifically to prevent states from accomplishing the piecemeal repeal of federal law by adopting conflicting legislative schemes that ostensibly "improve" upon the nationwide regime fashioned by Congress. *Felder v. Casey,* 487 U.S. 131, 141-42 (1988).[4]

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[4] Thus, the Court of Appeals turns on their heads traditional principles of federalism and deference to the legislative branch by suggesting that if "the lack of uniformity in this area is undesirable . . . It is for Congress and the agency to which it has delegated its power, the FTC, to make the policy judgment whether national uniformity . . . is desirable." A-11 *infra.* In fact, Congress and the FTC have expressly determined that as a matter of uniform nationwide policy, mechanisms should *not* be required to include the requirements that New York mandates. Neither Congress nor its delegate discussed or contemplated complementary state legislation in the area of dispute mechanisms, as would be expected if such *subsequent* supplemental state regulation was authorized. *Cf.* 42 U.S.C. § 6926(b); *California Coastal Comm'n. v. Granite Rock Co.,* 480 U.S. 572, 582-83 (1987).

By enacting subsequent provisions that conflict with deliberate federal policy, New York has impermissibly substituted its judgment for that of Congress, as did the Court of Appeals. *See Securities Industry Ass'n v. Connolly,* 883 F.2d 1114, 1124-25 (1st Cir. 1989), *cert. denied,* 58 U.S.L.W. 3753 (May 29, 1990) (Supremacy Clause prohibits state from substituting its judgment for that of Congress where Congress has chosen to legislate).

In light of the federal interests at stake and the increasing level of state attempts to regulate the field,[5] guidance from this Court is required on the extent to which the preexisting federal statute preempts such subsequently enacted state legislation.

B. The Writ Should Issue So That This Court Can Review A Decision Permitting States To Compel Conduct Congress Expressly Chose To Make Optional

The Court of Appeals recognized that a state statute "actually conflicts with federal law" in violation of the Supremacy Clause when "compliance with both state and federal law is impossible . . . or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]" A-12 *infra*, quoting *California v. ARC America Corp.*, 109 S.Ct. 1661, 1665 (1989) (citation and quotation omitted). The Second Circuit acknowledged one aspect of the state law that makes it impossible to comply concurrently with Magnuson-Moss. New York's requirement of binding arbitration cannot be reconciled with the equally explicit mandate of Magnuson-Moss "that decisions of the mechanism shall not

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[5] The great majority of states, like New York before its 1986 amendments, continues to defer to Magnuson-Moss' dispute settlement regulations. *E.g.*, Colo. Rev. Stat. § 42-12-106 (1984) (approving warrantor mechanisms that comply with 16 C.F.R. Part 703). Recently, however, states have begun to follow the examples of New York and Minnesota and authorize creation of regulatory schemes that could conflict with the federal one. *E.g.*, Cal. Bus. & Prof. Code §§ 9889.70-.76 (West Supp. 1990) (approving the establishment of dispute resolution guidelines independent of federal rules and regulations); D.C. Code Ann. § 40-1303 (Supp. 1988) (establishing a board for arbitration proceedings); 1990 Ga. Laws 1245 (1990) (approving the establishment of dispute resolution guidelines independent of federal rules and regulations); Wash. Rev. Code Ann. § 19.118.080-.150 (Supp. 1990), (providing that the attorney general contract with private entities to conduct arbitration proceedings).

be legally binding." A-13 *infra.*[6] Thus, unlike the state laws reviewed in *Automobile Importers of America, Texas Motor Vehicle Commission,* or *Wolf,* New York presents (as the Court of Appeals conceded) the unique circumstance of a state requiring warrantors to comply with its law in derogation of the Act.

The Court of Appeals also conceded that "[t]here are a number of [other] differences between the Lemon Law amendments and the FTC Regulations[,]" such as oral hearings, mandatory remedies, record keeping, and qualification of arbitrators. A-12 *infra.*[7] The Second Circuit shrugged aside these conflicts, asserting only that the differences between state and federal law were not "earth-shattering." A-13 *infra.*

New York's binding arbitration requirement, N.Y. Gen Bus. Law § 198-a(h), exemplifies the statute's violation of the supremacy doctrine. The FTC conclusively determined that non-binding arbitration was compelled by Congress and was necessary to ensure flexibility and to safeguard consumers. FTC Statement at 60210. Indeed, the FTC has determined that under the Act or its regulations, warrantors may not even *refer* in their

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[6] 16 C.F.R. § 703.5(j) provides:

> Decisions of the Mechanism shall not be legally binding on any person . . .

N.Y. Gen. Bus. law § 198-a(h) provides:

> A manufacturer shall have up to thirty days from the date the consumer notifies the manufacturer of his or her acceptance of the arbitrator's decision to comply with the terms of that decision.

[7] Indeed, the Practice Commentary to the statutory compilation of New York's Lemon Law concludes that the state law so conflicts with Magnuson-Moss that the "congressional objective of the encouraging federally qualifying mechanisms may be impeded and perhaps thwarted." Givens, *Practice Commentaries* (N.Y. Gen. Bus. Law § 198-a), 19 McKinney's Consol. Laws N.Y. Ann. 320 (1988).

warranties to any binding non-judicial remedy.[8] New York's insistence upon a binding non-judicial process is therefore expressly prohibited by the Act. Any use of such a procedure would place a warrantor in violation of Magnuson-Moss. FTC Statement at 60211; *see supra* n.6.

The Court of Appeals recognized that warrantors confronting the Hobson's choice of conforming either to state or federal law must choose non-compliance with the Act in deference to New York Law. A-13 *infra* ("[A] manufacturer remains free not to set up a mechanism in New York thus avoiding a binding dispute resolution under the challenged provisions of the Lemon Law"). This suggestion that direct and explicit state-federal conflicts can be resolved simply by foregoing compliance with federal law is irreconcilable with the Constitution's mandate that national legislation be supreme.

Left undisturbed, this holding would permit states to repeal federal laws by subsequently creating contrary state regulatory schemes that effectively prevent adherence to the nationwide standards legislated by Congress. Such legislation, where states purport to "withdraw federal remedies by establishing state remedies as exclusive", has aptly been characterized by this Court as constitutionally impermissible "reverse preemption". *Adams Fruit Co. v. Barrett,* 110 S.Ct. 1384, 1390 (1990).

The decision below relied on the directive that the FTC prescribe "minimum requirements" for mechanisms, 15 U.S.C. § 2310(a)(2), as an indication that Congress did not intend for

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[8] "As the [FTC] Staff Report makes clear, there is nothing in the Rule [703] which precludes the use of any other remedies by the parties *following* a [dispute resolution] Mechanism decision. The warrantor, the Mechanism, or any other group can offer a binding arbitration option to consumers who are dissatisfied with Mechanism decisions or warrantor intentions. *However, reference within the written warranty to any binding, nonjudicial remedy is prohibited by the Rule and the Act.*" FTC Statement at 60211 (footnote omitted; emphasis added).

warrantors to have the right to incorporate into their warranties mechanisms that comply with the FTC's regulations. A-9-10 *infra*. This reasoning contradicts the plain wording of Magnuson-Moss that any mechanism that "meets the requirements of the [Federal Trade] Commission's rules" can be incorporated into a written warranty and made subject to the prior resort requirement. 15 U.S.C. § 2310(a)(3).

Of equal importance, the "minimum standards" analysis upon which the Court of Appeals heavily relied has been rejected by this Court as an impermissibly broad exception that would trivialize the Supremacy Clause. A federal statute's authorization to a federal agency to promulgate "minimum standards" does *not* indicate "state authority to impose higher standards than the [federal agency] has prescribed." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 n.19 (1978) (citation omitted). This holding is particularly applicable where, as here, the federal government duly considered and rejected the specific measures (such as mandatory arbitration or oral hearings) subsequently adopted by the state.

Contrary to the Court of Appeals' implicit conclusion, Congress did not direct the FTC to prescribe "minimum" requirements so that maximum requirements could be determined by the states. "Minimum" standards were specified to effectuate the Act's overriding purposes of balancing competing interests by fashioning a flexible scheme of voluntary procedures tailored to the particular needs of each warrantor. The mechanisms would then be modified or enhanced by *warrantors* as they evaluate and respond to market conditions rather than administrative fiat.

The FTC made clear that the mandatory procedures and remedies subsequently adopted by New York would frustrate the Act's purpose of encouraging warrantors to establish uniform national mechanisms tailored to the needs of the marketplace. FTC Statement at 60209 ("the need to foster a

variety of Mechanisms, *including national ones,* is greater than the need for oral presentations at the behest of the parties") (emphasis added). A Congressional determination that federal regulation on a nationwide basis should be characterized by flexibility, a balancing of competing interests, and market competition must be respected. *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986) (state law is preempted if it "undermines Congress' determination" that policy options "be determined by market forces").

The decision below also erroneously relied on the Act's savings clause, 15 U.S.C. § 2311(b), where Congress expressed its desire to preserve existing state remedies alongside Magnuson-Moss. A-9 *infra.* The savings clause was intended solely to preserve then existing state causes of action. It cannot permit states to mandate pre-judicial warranty dispute resolution procedures as a condition to pursuing a (previously enacted) federal remedy.

Congress was the first to speak on the topic of pre-judicial dispute resolution. When the Act was passed in 1975, there were no state lemon laws or laws regulating automobile warranty dispute resolution mechanisms. *Cf. California v. ARC America Corp.*, 109 S. Ct. at 1665 (1989) (reasonable to infer no attempt to preempt state antitrust laws because twenty-one states had enacted such laws prior to adoption of federal statute). Magnuson-Moss established a federal remedy conditioned upon prior resort to informal dispute resolution of a prescribed type. A state cannot subsequently impose different or conflicting remedies, particularly if a warrantor is forced to *forego* compliance with federal law in order to avoid conflict with the state statute. The Supremacy Clause does not permit states "to withdraw federal remedies by establishing state

remedies as exclusive" through subsequent legislation. *Adams Fruit Co.*, 110 S. Ct. at 1390.[9]

In addition to its misplaced reliance on the Act's savings clause and "minimum requirements" language, the Court of Appeals determined that the Lemon Law was not preempted because the state provisions simply make mandatory what federal law makes discretionary. A-13 *infra*. The suggestion that a state may compel a choice that Congress has made optional has been rejected by this Court. *Transcontinental Gas Pipe Line Corp.*, 474 U.S. at 422 (State law is preempted if it "undermines Congress' determination" that policy options "be determined by market forces"). The court below disregarded Congress' express intent to allow warrantors the flexibility deemed necessary to implement the Act. It was inconsequential to the Second Circuit that New York imposes mechanism requirements that were considered and rejected by the federal government as inconsistent with the goals of flexibility and competition.

Because the New York Lemon Law undermines Congress' determination that mechanism procedures be determined by warrantors on a voluntary basis in reponse to market competition, it represents "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and is preempted. *California v. ARC America Corp.*, 109 S.Ct. at 1665. It has long been recognized that the Supremacy Clause is

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[9] Thus, the salutary policy of promoting judicial economy by the implementation of non-judicial dispute resolution techniques (such as the informal warranty dispute resolution mechanisms permitted under the Act) is ill-served by the Second Circuit decision. By permitting states to impose additional requirements on a Congressionally-designed system of informal dispute resolution, and acknowledging that states may do so to the point where warrantors are forced to abolish such non-judicial procedures in order to avoid violating federal law, the decision below invites further burdening of federal dockets with cases that might otherwise have been resolved without resort to the courts.

equally applicable to and supersedes state laws that conflict with a Congressional decision to create a uniform nationwide scheme characterized by choice and discretion. *E.g., Lawrence County v. Lead-Deadwood School District,* 469 U.S. 256, 269-70 (1985) (in light of "strong congressional concern that local governments have maximum flexibility[,]" state's "attempt . . . to limit the manner" in which discretion permitted by federal law can be exercised "obstructs this Congressional purpose and runs afoul of the Supremacy Clause").

Further, in *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta,* 458 U.S. 141, 155 (1982), this Court expressly stated that the Supremacy Clause prohibits the states from requiring what Congress has made optional:

> *The conflict* [between federal and state law] *does not evaporate because the [federal] regulation simply permits, but does not compel,* federal savings and loans to include due-on-sale clauses in their contracts and to enforce those provisions . . . *The [federal agency] consciously has chosen not to mandate* use of due-on-sale clauses "because [it] desires to afford associations the flexibility to accommodate special situations and circumstances."

(emphasis added; citation omitted).[10] The decision below

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[10] The Court of Appeals attempted to distinguish *Fiedelity* and *Ray v. Atlantic Richfield Co.* by stating that those cases involved "clear statement[s] of Congress' intent to prempt state laws" or "involved the regulation of matters of peculiarly federal concern." A-10 *infra.* It is questionable whether requiring prior resort to private dispute mechanisms (designed by the state) before suing upon a federally created cause of action can fairly be considered as addressing areas traditionally regulated by the states. *Cf. Felder,* 487 U.S. at 141-42 (state may not enact subsequent legislation affecting right to existing federal cause of action).

The Court of Appeals' requirement of an express statement of intent to preempt contradicts the principle of implied preemption in those instances where state laws "impede the purposes and objectives of Congress" in the absence of an express preemption clause in the federal statute. *R.J. Reynolds Tobacco Co. v. Durham County, North Carolina,* 479 U.S. 130, 140 (1987), citing *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

rewrites the Supremacy Clause by permitting a state to deprive warrantors of a federal right conferred by the Act and regulations: the right to structure their warranty programs in accordance with the needs of customers and the demands of the marketplace rather than in a response to the dictates of any state.

Like the optional use of due-on-sale clauses provided by federal law in *Fidelity*, optional oral hearings and flexible remedies in Magnuson-Moss reflect deliberate Congressional policies that cannot be reversed by an individual state. Despite New York's avowedly laudable goal of bettering the regulatory scheme fashioned by Congress, the Constitution forbids enactment of "a state law whose central purpose is to regulate matters that Congress intended . . . to regulate." *Schneidewind*, 485 U.S. at 308-09. The Supremacy Clause does not contain an exception for states that wish to improve upon the regulatory scheme fashioned by Congress.

CONCLUSION

If states can deprive warrantors and consumers of the flexibility and market competition intended by Congress in Magnuson-Moss, an indirect but effective means of nullifying the Act will have been achieved. This violates the Supremacy Clause. New York's particular revision of Magnuson-Moss, which requires warrantors not to comply with federal law, represents a particularly suspect type of state revision of national legislation. Now that the circuits are divided on the question and more states stand poised to legislate in this area, it is essential that this Court resolve the serious issues of federal supremacy presented in this case.

For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF the UNITED STATES, INC., and Automobile Importers of America, Inc.,

Plaintiffs-Appellees,

v.

Robert ABRAMS, Attorney General of the State of New York,

Defendant-Appellant.

No. 886, Docket 89-7971

United States Court of Appeals, Second Circuit.

Argued Feb. 20, 1990.

Decided March 26, 1990.

Jane M. Azia, New York City, Asst. Atty. Gen. of the State of N.Y. (Robert Abrams, Atty. Gen. of the State of N.Y., John W. Corwin, Asst. Atty. Gen. in Charge, Bureau of Consumer Frauds and Protection, Mary Hilgeman, Harvey M. Berman, Asst. Attys. Gen., of counsel) for defendant-appellant.

William R. Stein, New York City (Hughes Hubbard & Reed, New York City and Washington, D.C., William R. Maguire, David B. Madoff, of counsel), for plaintiffs-appellees.

John C. Lamb, Jeff B. Marschner, Richard A. Elbrecht, Mary-Alice Coleman, Legal Services Unit, Div. of Legal Affairs, California Dept. of Consumer Affairs, Sacramento, Cal., of counsel, for Michael A. Kelley, Director of Dept. of Consumer Affairs for the State of Cal., as amicus curiae.

John S. Smith, III, Governor's Office of Consumer Affairs, Atlanta, Ga., for the Nat. Ass'n of Consumer Agency Administrators, Washington, D.C., as amicus curiae.

Hubert H. Humphrey, III, Atty. Gen. of the State of Minn., D. Douglas Blanke, Asst. Atty. Gen. Tracy Smith, Sp. Asst. Atty. Gen., of counsel, for States of Minn., Conn., Fla., Ind. and Ohio, as amicus curiae.

Before FEINBERG, CARDAMONE and MINER, Circuit Judges.

FEINBERG, Circuit Judge:

In this appeal, we again face the increasingly complex problem of applying preemption doctrine. Defendant Robert Abrams, Attorney General of the State of New York, appeals from a judgment of the United States District Court for the Southern District of New York, Leonard B. Sand, J., holding certain amendments to New York's automobile "Lemon Law," in particular, GBL §§ 198-a(g), (h) and (m), preempted under the Supremacy Clause of the United States Constitution by the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312, and by regulations promulgated by the Federal Trade Commission (the FTC) pursuant to the Act (The FTC Regulations). *See* 16 C.F.R. §§ 703.1-703.8. The judge's opinion is reported at 697 F. Supp. 726. We conclude that the Lemon Law amendments are not preempted, and thus reverse and remand.

Background

Next to a house, a car is perhaps the most significant purchase that most consumers make. Manufacturers of automobiles routinely provide warranties to consumers. Until relatively recently, however, these warranties were governed exclusively by the Uniform Commercial Code (UCC) and state common law, and a consumer who had a dispute with a manufacturer concerning performance of a car under the warranty had only the remedies of suit under the UCC or the common law. These remedies apparently were not effective, particularly for a consumer saddled with a chronically defective automobile, popularly known as a "lemon."

After many years of study, and partially in response to "a rising tide of complaints . . . from irate owners of motor vehicles complaining that automobile manufacturers and dealers were not performing in accordance with the warranties on their automobiles," H.R. Rep. No. 93-1107, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 7702, 7708, Congress passed the Magnuson-Moss Warranty Act (the Act) in 1975. *See* Pub. L. 93-637, 88 Stat. 2183. The thrust of the Act is disclosure. "In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products," the Act requires that "any warrantor warranting a consumer product" must "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." 15 U.S.C. § 2302(a). The Act does not require that a warranty be provided, but mandates that, if one is given, it not be misleading.

As an additional goal, the Act is designed to encourage warrantors of consumer products "to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms." 15 U.S.C. § 2310(a)(1). To accomplish this, the Act directs the FTC to "prescribe rules setting forth minimum requirements for any informal dispute settlement procedure," *Id.* § 2310(a)(2), and states that a warrantor "may establish an informal dispute settlement procedure which meets the requirements" laid down by the FTC. *Id.* § 2301(a)(3). If a warrantor's mechanism meets the minimum requirements established by the FTC, the Act permits the warrantor to require consumers to resort to its dispute settlement mechanism before suing it under the Act. *Id.*

The FTC subsequently promulgated regulations governing such mechanisms. *See* Part 703—Informal Dispute Settlement Mechanisms: Promulgation of Rule, 40 Fed. Reg. 60190, 60191 (Dec. 31, 1975). The FTC Regulations set forth requirements such as organization of the dispute settlement mechanism,

qualification of arbitrators, operation of the mechanism, record-keeping, audits and openness of records and proceedings. *See* 16 C.F.R. § 703.3-703.8.

The Act, however, apparently was not successful in resolving consumer problems with chronically defective automobiles. appellant Abrams, for example, reported that his office and other consumer protection agencies had received an "endless stream of consumer complaints regarding the purchase of new cars which fail to meet reasonable standards of quality, durability and performance." In response, and along with a number of other states, New York in 1983 passed the Lemon Law. *See* 1983 N.Y. Laws 840, ch. 444 (codified at GBL § 198-a); *see generally* Note, Lemon Laws: Putting the Squeeze on Automobile Manufacturers, 61 Wash. U.L.Q. 1125, 1147 n.119 (1984) (citing statutes). The heart of the Lemon law is its "refund or replace" provision—i.e., its requirement that, during the first two years or 18,000 miles of operation, GBL § 198-a(b), if a manufacturer is unable to repair the same problem after four tries or if a vehicle is out of service a total of 30 days or more, *Id.* § 198-a(d), then "the manufacturer, at the option of the consumer, shall replace the motor vehicle with a comparable motor vehicle, or accept return of the vehicle from the consumer and refund to the consumer the full purchase price" of the automobile. *Id.* § 198-a(c)(1).

In 1986, New York amended the Lemon Law, adding the provisions under attack in this case. *See* 1986 N.Y. Laws 1882, ch. 799 (amending various subsections of GBL § 198-a). Among other things, the Lemon Law amendments were designed to address "growing consumer dissatisfaction with informal dispute settlement mechanisms" administered by motor vehicle manufacturers. Approval Memorandum of Governor Cuomo, Senate Bill No. 3342-A, August 2, 1986. The Lemon Law amendments provide that although a manufacturer is not required to offer a dispute resolution mechanism in New York, if a manufacturer does so, it must, at a minimum: comply with the

Lemon Law, GBL § 198-a(g); comply with the FTC Regulations, *Id.* § 198a(m)(1)(ii); provide arbitrators trained in arbitration and familiar with the Lemon Law, *Id.* § 198-a(m)(i); and afford consumers an opportunity to make an oral presentation to the arbitrator. *Id.* In addition, both arbitrators and consumers must receive a copy of a document entitled "New Car Lemon Law Bill of Rights," outlining consumers' substantive rights under the statute. *Id.; see also Id.* § 198-a(m)(2)(text of New Car Lemon Law Bill of Rights). The Lemon Law amendments also require a manufacturer to comply with any decision accepted by the consumer within 30 days of acceptance, or face penalties for non-compliance, *Id.* § 198-a(h), and to keep certain records of the awards by the mechanism and the number of days it takes to issue and comply with decisions. *Id.* § 198-a(m)(3).

In December 1986, plaintiffs-appellees brought the suit now before us. Plaintiff-Appellee Motor Vehicle Manufacturers Association of the United States, Inc., is a trade associations of various domestic motor vehicle manufacturers, while plaintiff-appellee Automobile Importers of America, Inc., is a trade association of various foreign motor vehicle manufacturers, importers and distributors. In their original and amended complaints, appellees challenged the Lemon Law amendments on the ground that they conflicted with various provisions of the United States Constitution, including the Supremacy Clause. Only the latter claim is now before us.

In 1988, the district court ruled that the Act and the FTC Regulations occupied the field of informal dispute resolution mechanisms, and the "there is no room in this system for states to tinker with the federal criteria, possibly discouraging the creation of mechanisms." 697 F. Supp. at 736. In addition, although the district court stated that the Lemon Law amendments "do not appear draconian," *Id.* at 729, it nevertheless found that there were a "a number of ways in which the state statute actually conflicts with the federal statute and regula-

tions." *Id.* at 742. The district court thus held that the Lemon Law amendments were preempted by the Act and by the FTC Regulations. *Id.* at 744. After all the other claims raised by plaintiffs were disposed of, this appeal followed.

DISCUSSION

Appellant Abrams contends that the district court erred in holding that the Act and the FTC Regulations preempt the Lemon Law amendments. Appellant argues that Congress has not occupied the field of consumer protection in general or consumer arbitration programs in particular, and that there is no actual conflict between the Lemon Law amendments and the federal regulatory scheme. Appellees, on the other hand, assert that the Lemon Law amendments are preempted because Congress intended to occupy the area exclusively and because the amendments conflict with federal law.

We begin our analysis with the standards governing preemption. There are several ways in which preemption may occur. *See Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712-13 (1985); *National Fuel Gas Supply Corp. v. Public Serv. Comm'n*, 894 F.2d 571, 575 (2d Cir. 1990). Congress can preempt state law expressly, "by so stating explicit terms on the face of a statute." *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 53 (2d Cir. 1988). Furthermore, in the absence of an express statement, Congress may still preempt state law when it "intends that federal law occupy a given field." *California v. ARC America Corp.*, 109 S.Ct. 1661, 1665 (1989). And even if Congress does not expressly preempt or intend to occupy the field, state law is nevertheless preempted if it "actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]' " *Id.* (citations omitted; quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

The Supreme Court has cautioned, however, that courts must, when considering a preemption claim, give careful attention to the subject matter of the congressional legislation. "When Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Thus, a litigant challenging a state statute on preemption grounds in such a field must overcome a "presumption against finding preemption of state law." *Id.*

Appellees concede that the present case does not involve a claim of express preemption. Rather, the questions before us are whether Congress intended to occupy the field of regulation of manufacturers' informal dispute resolution mechanisms, and whether the Lemon Law amendments actually conflict with the Act and the FTC Regulations. In resolving these issues, we bear in mind that consumer protection through warranty law is an area of traditional state regulation. *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192, 1205 (5th Cir. 1985); *see ARC America*, 109 S.Ct. at 1665 (noting the "long history" of state regulation of monopolies and unfair business practices). Indeed, "it was not until 1975 that Congress entered the fray" by passing the Act. *Chrysler Corp.*, 755 F.2d at 1205. As a result, "appellees must overcome the presumption against finding preemption of state law" in this area. *ARC America*, 109 S.Ct. at 1665.

A. Did Congress Intend to Occupy the Field?

Appellees insist that Congress intended to occupy the field of informal settlement mechanisms for warranty disputes. They argue that the FTC has promulgated extensive regulations governing every aspect of informal settlement mechanisms, and assert that the Lemon Law amendments upset the balance of interests carefully struck by the Act and the FTC Regulations.

We are not persuaded that Congress intended to occupy the field. Certainly, appellees have not met their burden of showing that the "clear and manifest purpose of Congress," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), in legislating in this area of traditional state regulation was to preempt state law. Indeed, the purpose of Congress seems to have been just the opposite—that is, that federal law and state law should exist side by side. Thus, the Act directs the FTC to "prescribe rules setting forth *minimum requirements* for any informal dispute settlement procedure." 15 U.S.C. § 2310(a)(2)(emphasis added). Use of the term "minimum" strongly suggests that Congress intended federal law in this area to supplement, not supplant, the rights and remedies provided by state law. Otherwise, the term "minimum requirements," rather than "maximum requirements," "exclusive requirements" or some similar phrase would make no sense in this context.

This reading of the Act is bolstered by other terms of the statute. The Act contains a broad savings clause, which states that "[n]othing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law." *Id.* § 2311(b)(1). Furthermore, the Act does have an express preemption provision, but its effect is narrowly limited to preempting state requirements relating "to labeling or disclosure with respect to written warranties or performance thereunder." *Id.* § 2311(c)(1)(A). Obviously, Congress knew how to preempt in this very statute when it wanted to. And, the Act allows a warrantor to establish a mechanism that does not require resort to the mechanism as a prerequisite to filing a lawsuit under the Act. *See Id.* § 2310(a)(3). If the Act contemplates non-conforming mechanisms, it is hard to see how Congress can be said to have occupied the field.

In addition, the legislative history of the Act underlines that it was intended as an alternative, not as an exclusive, approach in informal resolution of warranty disputes. The Senate Conference Report accompanying the Act noted that if a consumer

chooses not to use the dispute settlement procedures established under 15 U.S.C. § 2310, then the Act's savings clause "preserves *all alternative avenues of redress,* and utilization of any informal dispute settlement mechanism would then not be required by any provision of this Act." S. Conf. Rep. No. 93-1408, 93rd Cong., 2d Sess. (1974) (emphasis added), reprinted in 1974 U.S. Code Cong. & Admin. News 7755, 7759.

Finally, the FTC itself has interpreted the Act as a supplement to, not a replacement for, state law. Thus, the FTC has stated that the provision that state laws relating to labeling or disclosure are preempted except as provided in the Act's savings clause "makes it absolutely clear that consumer rights and remedies under state law *would never be* affected by the" Act. Warranties Complying with Magnuson-Moss Warranty Act, 42 Fed. Reg. 54004, 54005 (Oct. 4, 1977) (emphasis added). The FTC has also asserted that "[i]n general, the protections of the Warranty Act are in addition to, rather than in lieu of, warranty rights and remedies under State law," and that although "allowing the use of uniform warranty documents is a goal of section 111 [15 U.S.C. § 2311], this goal is subordinate to that of permitting the States to fashion their own scheme of warranty rights and remedies *which may be more protective than the minimum level of protection of the Federal Act.*" Preemptive Effective of Section 111(c)(1) of the Magnuson-Moss Warranty Act, 43 Fed. Reg. 50737, 50737-38 (Oct. 31, 1978) (footnote omitted; emphasis added); *see also* Part 703—Informal Dispute of Settlement Mechanisms: Promulgation of Rule, 40 Fed. Reg. 60190, 60191 (Dec. 31, 1975) ("[B]y incorporating a mechanism into a written warranty, the warrantor undertakes obligations in addition to, not in lieu of, obligations under existing law."). In addition, the regulations that the FTC promulgated pursuant to the Act require manufacturers to alert consumers that state law may provide additional rights and protections. *See, e.g.,* 16 C.F.R. §§ 701.3(a)(7)-(9).

Appellees play down the Act's use of the term "minimum requirements" by arguing that all Congress intended was to leave

room for manufacturers to adopt additional requirements voluntarily, not for the states to add requirements. We believe that the Act's other provisions, its legislative history and the FTC's interpretations cited above do not support the view that the term "minimum requirements" gives leeway to manufacturers but not to anyone else.

Appellees also contend that under cases such as *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987), *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141 (1982), and *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978), Congress can still preempt despite the Act's reference to minimum requirements and despite its savings clause, because the Act and the FTC Regulations set up a carefully articulated regulatory scheme that state law upsets. Appellees fail to recognize, however, that the cases they cite in support of preemption involved instances where there was a clear statement of Congress' intent to preempt state law, *see, e.g., Fidelity Federal Sav. & Loan Ass'n,* 458 U.S. at 147, or involved the regulation of matters of peculiarly federal concern. *See, e.g., International Paper Co.,* 479 U.S. at 487 (interstate water pollution); *Atlantic Richfield Co.,* 435 U.S. at 154-55 (tanker design and tanker navigation in waters "controlled in major respects by federal law"). Appellees also argue that the comprehensiveness of the FTC Regulations manifests a Congressional intention to preempt the field. However, in a field traditionally regulated by the state law, "[w]e are even more reluctant to infer preemption from the comprehensiveness of statutes." *Hillsborough County,* 471 U.S. at 717.

Finally, appellees point out that the Fourth Circuit has held that Congress intended to occupy the field, citing *Wolf v. Ford Motor Co.,* 829 F.2d 1277, 1279-80 (4th Cir. 1987). However, there is conflicting authority, particularly *Automobile Importers of America, Inc. v. Minnesota,* 871 F.2d 717, 721-22 (8th Cir.), *cert. denied,* 110 S.Ct. 201 (1989); see also *Chrysler*

Corp., 755 F.2d at 1203-04.[1] With all deference, we find the result reached by the Eighth Circuit in *Automobile Importers* more persuasive than that of the Fourth Circuit in *Wolf*. The panel in the latter case did not consider the meaning of the Act's reference to "minimum requirements," which we find significant. *See* 829 F.2d at 1279-80. Nor did *Wolf* refer to the Act's savings clause, its legislative history or the FTC's interpretations of the Act, upon all of which we have relied.

The Act obviously represents a compromise between warrantors and consumers and, as is frequently the case in such situations, the process of compromise results in a statute creating problems of interpretation. We do not suggest that the Act is crystal clear on the issue of preemption. If it were, presumably this litigation would not be before us. But precisely because the Act is not absolutely clear, the presumption against preempting state regulation in field traditionally ruled by state law takes on importance. Appellees may be correct that state laws such as the Lemon Law create difficulty for them, and that the lack of uniformity in this area is undesirable. We express no view as to that. However, we believe that this argument is addressed to the wrong forum. It is for Congress and the agency to which it has delegated it power the FTC, to make the policy judgment whether national uniformity in the regulation of manufacturers' dispute settlement mechanisms is desirable. By contrast, our task is to determine if Congress has already demonstrated its intention to preempt state law. We hold that Congress did not intend to occupy the field of informal settlement mechanisms for warranty disputes.

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[1] Relying on a single sentence in the lengthy opinion in *Chrysler Corp.*, appellees read that decision as supporting their view. However, the *Chrysler Corp.* panel said "we are unpersuaded by Chrysler's arguments that federal law occupies the field of informal settlement mechanisms for warranty disputes or that federal law either expressly or impliedly preempts the remedies and procedures created by" state law. 755 F.2d at 1203-04.

B. Do the Lemon Law Amendments Actually Conflict with the Act and the FTC Regulations?

Appellees assert that the Lemon Law amendments actually conflict with the Act and the FTC Regulations. As noted above, a state statute "actually conflicts with federal law" when "compliance with both state and federal law is impossible, or when the state law and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]' " *ARC America Corp.*, 109 S.Ct. at 1665 (citations omitted; quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Appellees claim that both types of actual conflict are present here.

1. Is Compliance Impossible?

We turn first to the argument that compliance with both the state and federal law is impossible. There are a number of differences between the Lemon Law amendments and the FTC Regulations. First, private dispute decisions are binding upon the manufacturer if the consumer so elects under the Lemon Law amendments, while decisions are not legally binding on anyone under the FTC Regulations. Second, consumers have the right to make an oral presentation to the arbitrator under the Lemon Law amendments, but oral presentations are only permitted under the FTC Regulations if both parties agree, and if certain disclosures are made to the consumer. Third, mechanisms must comply with the Lemon Law, and presumably its substantive terms, while arbitrators may apply any remedies that are appropriate in the circumstances under the FTC Regulations. Fourth, the Lemon Law amendments require that mechanisms compile more extensive records than do the FTC Regulations. Fifth, the Lemon Law amendments demand that mechanism staff be familiar with the Lemon Law's provisions and trained in arbitration, while the FTC Regulations require only that the mechanism be staffed by persons interested in the fair and expeditious settlement of consumer disputes.

While the differences between the Lemon Law amendments and FTC Regulations are obviously not earth-shattering, appellees are nevertheless correct that they exist. However, for preemption to occur here, there must be more than mere differences between the state and federal regulatory systems; rather, compliance with the two must be a "physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963); *see also ARC America Corp.*, 109 S.Ct. at 1665 (actual conflict means that "compliance with both state and federal law is impossible"). We are not persuaded that it is physically impossible to comply with both the Lemon Law amendments and the FTC Regulations.

For example, even though the consumer's acceptance of the arbitrator's decision under the Lemon Law amendments makes the mechanism's decision binding, nothing in the Act or the FTC Regulations forbids a warrantor from entering into binding arbitration. Furthermore, while the FTC Regulations state that decisions of the mechanisms shall not be legally binding on any person, a manufacturer remains free not to set up a mechanism in New York thus avoiding a binding dispute resolution under the challenged provisions of the Lemon Law. Similarly, as to the Lemon Law amendments' requirement that mechanisms comply with the Lemon Law, nothing in the FTC Regulations says that the Lemon law's substantive remedies—and, in particular, its core "replace or return" provision—are forbidden under federal law. Indeed, the FTC Regulations specifically list "repair, replacement, refund, reimbursement for expenses" as possible remedies. 16 C.F.R. § 703.5(d)(1). And, the FTC Regulations' rather vague reference to "any remedies appropriate under the circumstance," *Id.*, practically invites alternative remedies.

Nor do we find that the Lemon Law amendments' oral hearing provision makes compliance with the Act and the FTC Regulations impossible. The latter explicitly permit oral hearings, and only differ from the Lemon Law amendments in pro-

viding that both the warrantor and the consumer must agree to have an oral hearing, and that certain disclosures must be made to the consumer. Furthermore, the record reveals that several manufacturers who apparently comply with the FTC Regulations offer oral hearings as part of their programs.

Moreover, that the Lemon Law amendments impose training and recordkeeping requirements different from those required by the FTC Regulations does not by itself establish a conflict warranting preemption. *See Environmental Encapsulating Corp.*, 855 F.2d at 59. In *Hillsborough County*, for example, the Supreme Court upheld, against preemption challenge, a state statute imposing "testing and recordkeeping requirements" concerning donation of blood "beyond those contained in the federal regulations" promulgated by the Food and Drug Administration. 471 U.S. at 710. Given the size and sophistication of automobile manufacturers, and the ready availability of computer technology, appellees' protests that they cannot comply simultaneously with the recordkeeping requirements of the Lemon Law amendments and the FTC Regulations are not convincing.

We also note that a panel of this court recently rejected a preemption challenge—albeit in a somewhat different factual context—to certain of the Lemon Law amendments. In *General Motors Corp. v. Abrams* (2d Cir. 1990), the manufacturer (GM) and the FTC had entered into a consent decree, which required GM to operate an arbitration mechanism under the auspices of the Better Business Bureau. *See id.*, at 37. The issue before the panel was whether certain provisions of the Lemon Law amendments were preempted by the decree. *Id.*, at 36, 37-38. Among other things, the panel held, over Judge Winter's dissent, that the Lemon Law amendments' requirements that GM's arbitration program comply with the Lemon Law, that arbitrators be trained in the Lemon Law and that additional records be kept did not actually conflict with the consent order. *Id.*, at 43. These are among the statutory provisions that appellees in the

present case claim present a direct conflict with federal law. Thus, although *General Motors* may technically not be dispositive in the broader factual context now before us, it considerably strengthens our conclusion that compliance with the Lemon Law amendments and the Act and FTC Regulations is not "physically impossible." *Id.*, at 40.

Appellees also contend that the Lemon Law amendments interfere with certain federally protected rights under the Act, such as a warrantor's right to incorporate a mechanism that conforms to the Act's minimum standards into its written warranties, and the right to operate a nonconforming mechanism. In addition, they assert that the Lemon Law amendments encroach on the "exclusive" federal supervision of warrantors' informal dispute resolution mechanisms, and that the Lemon Law amendments' requirement that a mechanism comply with the FTC Regulations is impossible to obey, since a mechanism cannot simultaneously comply with the FTC Regulations and the Lemon Law amendments.

None of these contentions persuade us that the Lemon Law amendments are preempted. The heart of appellees' argument is that manufacturers have an affirmative "right," granted to them by the Act and the FTC Regulations, to operate a mechanism in New York that does not comply with the Lemon Law amendments. We find no such right in the Act or the FTC Regulations. With regard to the allegedly exlusive federal supervision of mechanisms, we simply do not agree, in light of the Act's use of the term "minimum requirements," that the federal regulatory scheme is meant to be exclusive. Finally, since we do not believe that compliance with both the Lemon Law amendments and the FTC Regulations is impossible, the Lemon Law amendments' requirement that mechanisms comply with the FTC Regulations is inoffensive.

2. Do the Lemon Law Amendments Frustrate the Purpose of Congress?

Appellees also contend that the Lemon Law amendments frustrate the purpose of Congress. According to appellees, the Act and FTC Regulations are meant only to encourage manufacturers to establish voluntary mechanisms, and the Lemon Law amendments discourage the formation of mechanisms by disturbing the federal regulatory scheme. We do not agree that the purpose of Congress was so narrow. Although appellees are correct that the Act had as a goal "to encourage warrantors to establish . . . informal dispute settlement mechanisms," 15 U.S.C. § 2310(a)(1), Congress did not desire the formation of such mechanisms as an end in itself. Rather, consistent with the broad consumer protection goal of the Act, Congress wanted "to encourage warrantors to establish procedures whereby consumer disputes are *fairly and expeditiously settled* through informal dispute settlement mechanisms." *Id.* (emphasis added). It would be myopic to interpret the purpose of Congress as only encouraging warrantors and not also protecting consumers. *See Id.* § 2302(a) (Act has among its purposes "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products"); H.R. Rep. No. 93-1107, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 7702, 7748 (provisions contained in the Act will, among other things, "promote greater consumer understanding of product warranties, assist the consumer in the enforcement of his warranty," and "assist in alleviating the inequities resulting from" the consumer's relative lack of bargaining power vis-a-vis the warrantor).

The Lemon Law amendments further, and do not frustrate, this additional purpose. They were designed in significant part to protect consumers—i.e., to address "growing consumer dissatisfaction with informal dispute settlement mechanisms" administered by motor vehicle manufacturers. Approval

Memorandum of Governor Guomo, Senate Bill No. 3342A, August 2, 1986. And, the thrust of the Lemon Law amendments is to give consumers more power in the dispute resolution process. Thus, consumers have an opportunity to make an oral presentation to the arbitrator; prior to arbitration, both arbitrators and consumers must receive a "New Car Lemon Law Bill of Rights," outlining consumers' substantive rights under the statute; and, a manufacturer must comply with any decision accepted by the consumer within 30 days of acceptance, or face panealties for non-compliance. It is hard to see how these provisions could be interpreted as frustrating the Act's goal of "fair[] and expeditious[] settle[ment]" of consumer disputes. 15 U.S.C. § 2310(a).

Conclusion

In conclusion, we hold that the Act and the FTC Regulations do not preempt the Lemon Law amendments. In reaching this result, we rule that Congress did not intend to occupy the field of informal dispute resolution mechanisms, that it is possible to comply with both the New York and federal schemes and that the Lemon Law amendments do not frustrate the purpose of Congress. We thus reverse the judgment of the district court, and remand for further proceedings consistent with this opinion.

APPENDIX B

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF the UNITED STATES, INC. and Automobile Importers of America, Inc.,
Plaintiffs,

v.

Robert ABRAMS, Attorney General of the State of New York, Defendant.

No. 86 CIV 9592 (LBS).

United States District Court, S.D. New York.

Oct. 13, 1988.

As Amended Oct. 28, 1988.

Hughes Hubbard & Reed, New York City and Philip A. Lacovara, William R. Stein, Edward J. Rubenstein, Washington, D.C., for plaintiffs.

William H. Crabtree, Detroit, Mich., for Motor Vehicle Mfrs. Ass'n of the U.S., Inc.

Robert Abrams, Atty. Gen of State of N.Y., New York City, John W. Corwin, Jane M. Azia, Sara Nathan, Mary Hilgeman, Asst. Attys. Gen., for defendant.

OPINION

SAND, District Judge.

STATEMENT OF FACTS

The Motor Vehicles Manufacturers Association and the Automobile Importers of America here challenge several provisions of the New York State "Lemon Law," General Business Law ("G.B.L.") § 198-a (McKinney 1988), alleging that under

the Supremacy Clause they are pre-empted by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, §§ 101 *et seq.*, codified at 15 U.S.C. §§ 2301 *et seq.* (1982), and the regulations promulgated thereunder by the Federal Trade Commission ("F.T.C." or "Commission"), at 16 C.F.R. § 703 (1988). The matter is before us on a motion for partial summary judgment brought by the Plaintiffs and a motion to dismiss brought by the Defendant Attorney General.

The Lemon Law was originally enacted in 1983 (Ch. 444, L. 1983), and was amended in 1986 (Ch. 799, L. 1986) to include provisions regulating dispute resolution mechanisms voluntarily established by automobile manufacturers. It is these amendments that are at issue here. We have previously determined in this same case that a 1987 amendment to the Lemon Law was invalid under the First and Fourteenth Amendments as a prior restraint on speech. *See* 684 F.Supp. 804 (S.D.N.Y. 1988). Pending further submissions from the parties, we do not here decide the Plaintiffs' challenge under the Commerce Clause to still other provisions of the Lemon Law.

Neither the Lemon Law nor the Magnuson-Moss Act purports to require manufacturers to establish dispute resolution mechanisms. Rather, they both require a manufacturer who chooses to establish a mechanism to ensure that the mechanism meets certain criteria.

A mechanism that fails to comply with the Lemon Law would be unlawful in New York. G.B.L. § 198-a(g). If a mechanism fails to meet the federal standards, however, it is not unlawful under federal law. A mechanism that fails to comply with Magnuson-Moss simply cannot be incorporated into the written warranty, and the manufacturer cannot make the use of it a prerequisite to the consumer's right to bring a civil suit under the Act. *See* 15 U.S.C. §§ 2310(a)(2) and (3); 16 C.F.R. §§ 703.2(a) and (b)(3); F.T.C. Statement of Basis and Purpose (for Rule on Informal Dispute Settlement Mechanisms, 16 C.F.R. § 703), 40 Fed. Reg. 60,190, 60,191 (1975).

CHALLENGED PROVISIONS

The Plaintiffs challenge the following specific provisions of the New York State Lemon Law:

1) a requirement that mechanisms allow oral hearings if the consumer so requests (G.B.L. § 198-a(m)(1)(i)). The F.T.C. regulations permit mechanisms to allow an oral presentation only if both warrantor and consumer expressly argree to the presentation (16 C.F.R. § 703.5(f)(1)).

(2) a requirement making the arbitrator's decision binding on the manufacturer, while it is not binding upon the consumer (G.B.L. § 198-a(h)). The F.T.C. regulations provide that mechanism decisions are non-binding, and require only that the warrantor act in good faith in deciding whether and to what extent it will abide by a mechanism decision (16 C.F.R. §§ 703.2(g), 703-5(j)).

3) a requirement that the arbitrators participating in such mechanisms be trained in arbitration and be familiar with the provisions of the New York State Lemon Law (G.B.L. § 1988-a(m)(1)(i)). The F.T.C. regulations require only that the mechanism be competently staffed so as to ensure the fair and expeditious resolution of disputes (16 C.F.R. § 703.3(a)).

4) additional recordkeeping requirements beyond those that would satisfy Magnuson-Moss (G.B.L. § 198-a(m)(3)). Compare the F.T.C. recordkeeping requirements at 16 C.F.R. § 703.6.

5) a clause requiring that manufacturers' mechanisms comply with the federal regulations, and thereby suggesting that the State of New York might have enforcement powers with respect to the federal regulations (G.B.L. § 198-a(m)(1)(ii)). Federal law makes compliance optional (15 U.S.C. § 2310(a)(2) and (3); 16 C.F.R. § 703.2(a)) and vests in the F.T.C. enforcement authority over any mechanism to which a written warranty requires a consumer to resort (15 U.S.C. § 2310(a)(4) and (c)).

6) a requirement that a notice detailing the consumer's rights and respnsibilities under state law, entitled "New Car Lemon Law Bill of Rights," be provided to consumers and arbitrators (G.B.L. § 198-a(m)(2)). Magnuson-Moss regulates written information provided to consumers relating to written warranties but not made part of a written warranty (15 U.S.C. § 2302(b)(1)(B)).

The state requirements enumerated above do not appear draconian. The state has made a policy decision that these measures would have a salutary effect upon the conduct of consumer dispute resolution, and perhaps they would. However, the question we must address is whether these measures can coexist with the policy determinations made and the measures enacted by Congres and the F.T.C.

DISCUSSION

"In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Ass'n v. Guerra,* 479 U.S. 272, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987) (*citing Shaw v. Delta Airlines, Inc.,* 463 U.S. 85, 95, 103 S.Ct. 2890, 2898, 77 L.Ed.2d 490 (1983) and *Malone v. White Motor Corp.,* 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed.2d 443 (1978)). Pre-emption "is not to be lightly presumed." *California Fed. S. & L. v. Guerra,* 107 S.Ct. at 689 (*citing Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 2128, 68 L.Ed.2d 576 (1981)). Particularly when Congress legislates in a field traditionally occupied by the states, "we start with the assumption that the historic police powers of the States were not to be superseded by [federal law and regulations] unless that was the clear and manifest purpose of Congress." *Pacific Gas & Electric Co. v. Energy Resources Comm'n,* 461 U.S. 190, 206, 103 S.Ct. 1713, 1723, 75 L.Ed.2d 752 (1983) (*quoting Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91

L.Ed.2d 1447 (1947)). Because consumer protection and warranty law is a field traditionally occupied by the states, which Congress entered only in 1975 with the passage of Magnuson-Moss (*Chrysler Corp. v. Texas Motor Vehicle Comm'n,* 755 F.2d 1192, 1205 (5th Cir. 1985)), compelling evidence of an intention to pre-empt is required in this area. *See Environmental Encapsulating Corp. v. City of New York,* 855 F.2d 48, 58 (2d Cir. 1988).

There are three well-established situations in which a court should find a state statute to have been pre-empted. The first arises when Congress has expressly stated its intention that state law be pre-empted. *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 605 (1977). Absent express pre-emption, implied pre-emption is found where the scheme of federal regulation is so comprehensive that it is reasonable to infer that Congress intended to occupy the field, and that it "left no room" for supplementary state regulation (*Rice v. Santa Fe Elevator Corp.,* 331 U.S. 238, 230, 67 S.Ct. 1146, 1152, 91 L.Ed.2d 1447 (1947)). Even where Congress has not completely displaced state regulation in a certain field, state law is pre-empted to the extent it actually conflicts with federal law, either because "compliance with both federal and state regulations is a physical impossibility" (*Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963)), or because state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed.2d 581 (1941)). *See California Fed. S. & L. v. Guerra,* 107 S.Ct. at 689; *Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Marketing & Bargaining Bd.,* 467 U.S. 461, 469, 104 S.Ct. 2518, 2411, 81 L.Ed.2d 399 (1984); *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta,* 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982).

"Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. S. & L. v. De La Cuesta,* 458

U.S. at 153, 102 S.Ct. at 3022; *see Environmental Encapsulating v. City, supra* at 53. Where Congress has directed an agency to exercise discretion in fulfilling congressional policy, and where the agency thereupon promulgates regulations intended to pre-empt state law, the agency's decision to pre-empt will be upheld as long as it "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute . . . unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned. *Fidelity Fed. S. & L. v. De La Cuesta,* 458 U.S. at 154, 102 S.Ct. at 3023 (*quoting United States v. Shimer,* 367 U.S. 374, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961)); *see Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 699-700, 104 S.Ct. 2694, 2700, 81 L.Ed.2d 580 (1984). The mere fact that a federal agency had promulgated comprehensive regulations in a field is not sufficient to pre-empt state law. *Hillsborough County v. Automated Medical Labs,* 471 U.S. 707, 717, 105 S.Ct. 2371, 2377, 85 L.Ed.2d 714 (1985). Pre-emption occurs when a federal agency promulgates regulations with the clear intent that they be exclusive (*see id.* at 718, 105 S.Ct. at 2377) or when state law interferes with federal regulatory policy (*see Fidelity Fed. S. & L. v. De La Cuesta,* 458 U.S. at 155-56, 102 S.Ct. at 3023-24).

The Magnuson-Moss Act established federal warranty disclosure requirements and a federal remedy for breach of warranty. *See Boelens v. Redman Homes, Inc.,* 748 F.2d 1058, 1061-62 (5th Cir. 1984) (explaining purpose and general operation of the Act). The purpose of the Magnuson-Moss Act was to assure minimum warranty protection for consumers, to promote consumer understanding of warranties, to assure warranty performance and to improve product reliability. 40 Fed. Reg. 60, 168 (F.T.C. 1975). Within that context, Congress explicitly declared it to be its policy "to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms." 15 U.S.C. § 2310(a)(1); *see S. Conf. Rep. No.*

1408, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 7702, 7755, 7758. Presumably Congress hoped that many disputes would be settled in a co-operative rather than an adversarial setting so that the consumer could set forth the problem without the expense of going to court, and the manufacturer could evaluate the claim and provide relief quickly and quietly where merited.

Congress authorized the F.T.C. to "prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty." 15 U.S.C. § 2310(a)(2). If a voluntary mechanism meets the minimum standards promulgated by the F.T.C., the manufacturer can require a consumer to seek resolution of any dispute through the mechanism before seeking to enforce in a civil suit any rights created by the Act. 15 U.S.C. § 231](a)(3). This does not prevent the consumer from bypassing the mechanism in seeking to enforce rights and remedies other than those created by the Act.[1]

The F.T.C. has developed a regulatory scheme designed to balance the protection of consumers with the congressional imperative of "encouraging" manufacturers to establish such voluntary mechanisms. Plaintiffs assert that the states are entirely precluded from regulating dispute resolution mechanisms established by manufacturers because Congress and the F.T.C. have occupied that field. They further claim that New York's Lemon Law is inconsistent with the federal law and stands as an obstacle to the fulfillment of the full purposes of Congress, and

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[1] "Section 111(b) [i.e., the Magnuson-Moss Act's savings clause] and the Conference Report make clear that the consumer would be free to pursue alternate state or federal rights or remedies whether or not warrantor has incorporated a complying mechanism into the terms of his written warranty." F.T.C. Statement of Basis and Purpose (for Rule on Informal Dispute Settlement Mechanisms, 16 C.F.R. § 703), 40 Fed. Reg. 60,190, 60,191 (1975).

they point out that it imposes upon manufacturers costs and burdens the the Commission explicitly considered and rejected.[2] According to Plaintiffs, the Lemon Law tries to forge a different balance from that so painstakingly designed by the F.T.C., and it cannot stand.

1. Has Congress expressly pre-empted state law?

Magnuson-Moss contains both an express pre-emption clause (§ 111(c), codified at 15 U.S.C. § 2311(c)) and an express savings clause (§ 111(b), codified at 15 U.S.C. § 311(b)). The express pre-emption clause is specifically limited to state requirements that relate to labeling or disclosure with respect to written warranties or performance thereunder; that are within the scope of an applicable requirement of the sections of the Act (and regulations thereunder) pertaining to contents, designation, and minimum standards for written warranties; and that are not identical to the federal requirements. 15 U.S.C. § 2311(c)(1) *see* "Preemptive Effect of Section 111(c)(1) of Magnuson-Moss Warranty Act" (re: Wisconsin statute), 43 Fed. Reg. 50,737, 50,738 (F.T.C. 1978).

Plaintiffs do not allege, and we do not find, express preemption of state law with respect to informal dispute settlement mechanisms. We note, however, that the existence of an express pre-emption clause does not signify that no other preemption of state law was intended. *See Fidelity Fed. S. & L. v. De La Cuesta,* 458 U.S. at 162, 102 S.Ct. at 3027.

2. Has Congress occupied the field?

The Attorney General of the State of New York claims that § 110 of the Magnuson-Moss Act, by authorizing the F.T.C. to

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[2] For example, the Commission explicitly rejected mandatory oral hearings upon the consumer's request (*see* 40 Fed. Reg. at 60,209), binding arbitration (*see id.* at 60,210-11), and more extensive record-keeping requirements (*see id.* at 60,211).

promulgate "minimum" standards for warrantors' dispute settlement mechanisms, demonstrates that Congress and the F.T.C. intended to allow supplementary state regulation in this area.

While it is true that the statute, 15 U.S.C. § 2310, and regulations, 17 C.F.R. §§ 703.3-703.8, refers to "minimum requirements" for the mechanisms, this wording is subject to more than one interpretation. It could be understood, as the Attorney General suggests, to mean that the states are free to supplement the federal regulations in this area. It could also be understood to mean only that the mechanisms themselves, or the manufacturers who control them, are free to experiment with different provisions as long as they meet the minimum federal standards.

In *Ray v. Atlantic Richfield Co.*, the Supreme Court declined to interpret a congressional reference to "minimum standards" that were to be established by an agency as requiring recognition of state authority to impose higher standards than the agency has prescribed. 435 U.S. 151, 168 n. 19, 98 S.Ct. 988, 1000 n. 19, 55 L.Ed.2d 179 (1978). The Court determined that where Congress had expressly anticipated that foreign vessels would be considered sufficiently safe for certification by the Secretary if they satisfied certain design requirements, there was no room for the states to impose different or stricter design requirements. *Id.* at 168, 98 S.Ct. at 999.

The reasoning in *Ray v. Atlantic Richfield* was partly based upon a determination that Congress intended that there be uniform federal standards for vessels operating in the navigable waters of the United States. *Id.* at 165-67, 98 S.Ct. at 998-99. While we see no indication that Congress or the F.T.C. sought to establish total uniformity of the mechanism system throughout the United States, the F.T.C. has stated that it intended that existing nation-wide mechanisms be preserved and utilized. 40 Fed. Reg. at 60,209. This preservation of interstate mechanisms

would obviously be rendered more difficult, if not impossible, by the existence of a host of conflicting state lemon laws.

Plaintiffs state, and the Attorney General does not dispute, that there were not state lemon laws in existence when Magnuson-Moss was enacted in 1975. We doubt that Congress or the F.T.C., in speaking of "minimum" standards, envisioned so potentially disruptive and costly a situation as the individual regulation of manufacturers' mechanisms by each of the fifty states.

The Attorney General cites numerous cases standing for the proposition that Magnuson-Moss and the regulations promulgated thereunder do not occupy the field and do not pre-empt state law. We note, however, that most of these cases are not on point because they do not deal with the specific question of whether the F.T.C.'s regulations governing voluntary dispute settlement mechanisms were designed to be so all-encompassing as to preclude state regulation of those particular entities, voluntarily established by manufacturers under the auspices of federal law. *See, e.g, Katharine Gibbs School (Inc.) v. Federal Trade Comm'n,* 612 F.2d 658 (2d Cir. 1979) (at issue was the legality of an express pre-emption clause in F.T.C. regulations governing vocational and home study schools); *MacKenzie v. Chrysler Corp.,* 607 F.2d 1162 (5th Cir. 1979) (issue was whether state or federal law controlled measure of damages for breach of warranty); *Walsh v. Ford Motor Co.,* 627 F. Supp. 1519 (D.D.C.) (at issue were class certification and availability of punitive damages under Magnuson-Moss Act), *rev'd and remanded on issue of class certification,* 807 F.2d 1000 (D.C. Cir. 1986); *State ex rel. Guste v. Fedders Corp.,* 524 F. Supp. 552 (M.D. La. 1981) (questioned presented was whether federal question jurisdiction existed under Magnuson-Moss where plaintiffs' complaint alleged only violations of state unfair trade practices law): *Skelton v. General Motors Corp.,* 500 F. Supp. 1181 (N.D.Ill., E.D. 1980) (defining contours of "written warranty," "implied warranty," and "deceptive warranty" under

Magnuson-Moss), *rev'd on issue of "written warranty,"* 660 F.2d 311 (7th Cir. 1981); *People v. Ford Motor Co.*, 113 Misc.2d 828, 510 N.Y.S.2d 425 (N.Y.Sup.Ct. 1986) (adjudicating pre-emption challenge to a N.Y. Lemon Law disclosure provision regarding N.Y. Attorney General's interpretation of Lemon Law); *Olmstead v. General Motors Corp. Inc.*, 500 A.2d 615 (Del.Super.Ct. 1985) (contruing reach of Magnuson-Moss requirements as to notice of breach and opportunity to cure).

The Attorney General appears to cite these cases simply for the reiteration of the fact that Congress did not intend that the statute or the regulations issued under it pre-empt all state law relating to warranties or deceptive trade practices. We are in agreement with the Attorney General as to that issue. There is no question but that Congress and the F.T.C. contemplated, and even invited, a continunig state presence in the field of warranty law. The Magnuson-Moss Act's savings clause specifically preserves rights and remedies under state law.[3] The issue of whether one extremely limited arena, that of manufacturers' dispute settlement mechanisms to which consumers must resort before bringing a civil suit under the Act, is the exclusive preserve of federal law.

The Fourth and Fifth Circuits are the only federal appellate courts to have discussed the pre-emptive effect of Magnuson-

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[3] The savings clause provides as follows:

"(1) Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.

(2) Nothing in this chapter (other than sections 2308 and 2304(a)(2) and (4) of this title) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of a State law regarding consequential damages for injury to the person or other injury." 15 U.S.C. § 2311(b).

Moss and the F.T.C. regulations with respect to manufacturers' voluntary mechanisms. Both state that there is no room for state regulation in this area.

The Attorney General joins the Plaintiffs in directing our attention to *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192 (5th Cir. 1985), in which the Fifth Circuit held that a state administrative proceeding for warranty dispute resolution established by the Texas "lemon law" was not pre-empted by federal law. The Court was "unpersuaded . . . that federal law occupies the field of informal settlement mechanisms for warranty disputes or that federal law either expressly or impliedly preempts the remedies and procedures created by [the Texas statute]." *Id.* at 1203-04. The Attorney General claims that the logic of the opinion, which holds that Congress did not intend to occupy the entire field of informal settlement mechanisms, leads to the conclusion that there is room for state regulation of manufacturers' mechanisms.

Plaintiffs point out that the Court explicitly distinguished between the type of state-run arbitration program established by Texas law and at issue in that case, and the manufacturers' dispute resolution mechanisms at issue here. The Court stated: "We think it plain that the *preclusive effect of section 110 is limited to rules governing informal dispute resolution procedures created by private warrantors* and does not affect such schemes where provided as an option for consumers by state law." *Id.* at 1206 (emphasis added). The Attorney General replies that this was not the issue before the Court.

The Fourth Circuit, in addressing the question of whether a consumer could challenge the operation of a manufacturer's dispute resolution mechanism through a state fraud action, determined that it was Congress' intent that only the F.T.C. have authority to supervise whether the manufacturers' mechanisms are created and operated fairly. *Wolf v. Ford Motor Co.*, 829 F.2d 1277, 1279 (4th Cir. 1987). The Court stated:

"*The F.T.C. regulations* are extensive and address all facets of the mechanisms' operation. They *leave no room for state regulation.*" *Id.* (emphasis added). The Attorney General asserts that this is dictum, that it is wrong, and that the *Wolf* Court ignored the Supreme Court's statement in *Hillsborough County v. Automated Medical Labs* that federal *agencies* must be explicit when exercising any purported authority to pre-empt state law.[4]

The attorney General takes issue with both circuit court opinions, and he directs the Court's attention to two cases in which federal district courts in Minnesota and Kentucky have upheld provisions of state lemon laws that affect manufacturers' mechanisms. Some of those provisions are similar to provisions of the New York Lemon Law.

Minnesota's lemon law, like the New York law, requires that manufacturers' mechanisms offer consumers the opportunity to make an oral presentation. Unlike the New York law, it requires manufacturers to provide dispute resolution mechanisms, and it allows consumers to be charged a fee for the use of such a mechanism. *See Automobile Importers of America, Inc. v. Minnesota,* 681 F. Supp. 1374, 1376 (D. Minn. 1988) (*citing* Minn. Stat. Ann. § 325F.665). Federal law, as noted, allows oral hearings only upon the agreement of both parties (16 C.F.R. § 703.5(f)), and it does not require manufacturers to provide a mechanism (15 U.S.C. § 2310(a)), and does not allow them to charge consumers a fee for the use of a mechanism they

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[4] There, the Court stated: "[B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt." 471 U.S. at 718, 105 S.Ct. at 2377.

choose to provide (16 C.F.R. 703.3(a)). The Minnesota Court found that Congress and the F.T.C. had not "occupied the field" of manufacturers' mechanisms. It pointed out that the express pre-emption clause could have included informal dispute settlement mechanism procedures and did not do so; rejected an attempt by the plaintiffs to distinguish between substantive rights and procedural requirements; and found that there was not sufficient indication of congressional intent to pre-empt state law in this area. *Automobile Importers of Minnesota,* 681 F. Supp. at 1378-79. That Court distinguished *Wolf v. Ford* because it did not involve a challenge to a state lemon law. It declined to distinguish between state-run mechanisms and manufacturers' mechanisms in construing the Fifth Circuit's holding in *Chrysler v. Texas M.V.C.,* and declared that even if it were to accept that distinction, the Fifth Circuit's statement that "the preclusive effect of section 110 is limited to rules governing informal dispute resolution procedure created by private warrantors" is mere dictum. *Id.* at 1378 & n.4

The Kentucky Court determined that Kentucky's requirement that manufacturers' mechanisms hold an oral hearing unless such a hearing is waived by the consumer was within the express savings clause because it created a right or remedy to consumers under state law. *See Chrylser Corp. v. Armstrong,* No. 83-45, slip op. at 1 (E.D. Ky. Apr. 30, 1989) (*citing* Ky. Rev. Stat. § 367.860 *et seq.*). That Court did not specifically discuss the issue of federal intent to occupy the field of regulations of manufacturers' mechanisms. It relied upon an F.T.C. staff opinion stating:

> "The Warranty Act and its history show no Congressional intent whatsoever to occupy the field of warranty law, or even to exercise exclusive jurisdiction as to those aspects of warranty law addressed in the Act. On the contrary . . . Congress incorporated an express provision that strictly defines the areas of state law which were to be preempted. This provision was revised and narrowed numerous times

> in successive drafts of the bill. Furthermore . . . Congress included a broad savings clause, expressly preserving a wide range of state laws that give consumers rights and remedies not provided by the federal law. In such a context, a finding of implied preemption of a state law outside the narrow realm of express preemption must be based on strong evidence of a necessary conflict with the federal Act or rule."

Letter from F.T.C.'s William P. Golden and Rachel Miller to Kevin Noland, Kentucky A.A.G. (undated, but presumably written in early 1985), New York Attorney General's Memo of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of his Motion to Dismiss, dated Feb. 16, 1988, at Appendix C.

The F.T.C. in 1975 invited and considered comment on its proposed regulations, and it drew up an extremely detailed and comprehensive set of regulations designed to balance the competing interests, and to encourage manufacturers to establish or participate in dispute settlement mechanisms. Throughout the F.T.C.'s Statement of Basis and Purpose are repeated references to the agency's effort to find an equilibrium that keeps the burdens on manufacturers to a minimum while still sufficiently protecting the consumer. *See* 40 Fed. Reg. at 60,190-215. For example, the F.T.C. tells us that "[t]he legislative scheme of 'encouraging' warrantors to voluntarily bear the cost of establishing informal mechanisms neccessitates a careful analysis of costs or other disincentives that might

result from the Commission rule."[3] It would appear that the Commission did not contemplate the coexistence of regulation from other sources that would increase the potential discouragement of the mechanisms.

The principal incentive for manufacturers to establish complying mechanisms is that they may require consumers to resort to the mechanisms before bringing suit to enforce rights and remedies under the Act. *See* Schroeder, *Private Actions Under the Magnuson-Moss Warranty Act,* 66 Calif. L. Rev. 1, 33 (1978). In other words, a manufacturer who establishes a mechanism meeting specific federal criteria has a federally granted right to require consumers to utilize that mechanism as a prerequisite to bringing suit under the Act. It is difficult to imagine that Congress contemplated that the states should be involved in regulating these mechanisms, whose existence was intergrally related to a set of interwoven federal rights and remedies, explicitly segregated from state-created rights and remedies by the savings clause. We hold that there is no room in this system for states to tinker with federal criteria, possibly discouraging the creation of mechanisms, and possible "outlaw-

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[3] 40 Fed. Reg. at 60,191. The Statement continues:

> "The intent of the Act is to provide for fair and expeditious settlement of consumer warranty disputes, through informal mechanisms established voluntarily by warrantors. The Commission has determined that this legislative scheme is best implemented by a careful balancing of consumer and warrantor interests. The Rule is intended to establish a framework for fair and expedition[u]s settlement of warranty disputes at cost levels acceptable to warrantors . . ."
>
> "The Rule will permit a wide variation in form and procedures among complying mechanisms, in recognition of the variety among effective complaint handling mechanisms currently in existence. The intent is to avoid creating artificial or unnecessary procedural burdens so long as the basic goals of speed, fairness and independent participation are met."

Id. at 60,193.

ing" mechanisms that the federal government has defined to be acceptable and capable of triggering the manufacturers' federal right to require consumers to resort to them before going to court.

While we do not find language explicitly making federal reguations exclusive in this area, we do not read *Hillsborough County v. Automated Medical Labs* to require that there be such language."[6] The degree of comprehensivenes of the federal regulations in conjunction with the F.T.C.'s many expressions of the importance of balancing consumer and warrantor interests and its descriptions of the efforts to achieve an equilibrium that would encourage manufacturers to establish mechanisms voluntarily, bespeak a clear intent that the federal regulations govern the mechanism exclusively. This is sufficient to stake out a claim to the exclusive federal regulation of manufacturers' mechanisms.

Where Congress or a federal agency has striven to create a balanced relationship between competing interests through comprehensive statutory or regulatory treatment, state law that would upset that balance is pre-empted, whether it be statutory or common law. *See, e.g., International Paper v. Ouellette,* 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987) (Clean Water Act pre-empts law of states affected by pollution except law of state in which polluting source is located, because Congress established system requiring Environmental Protection Agency and source and affected state must not interfere with resulting balance of interests); *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.,* 474 U.S. 409, 106 S.Ct. 709, 88 L.Ed.2d

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[6] *See* note 4, *supra,* for relevant text from *Hillsborough County; cf. California Coastal Comm'n v. Granite Rock Co.,* 480 U.S. 572, 107 S.Ct. 1419, 1426-47, 94 L.Ed.2d 577 (1987) (quoting same paragraph from *Hillsborough County* and finding that federal Forest Service regulations in question not only were devoid of any expression of intent to pre-empt state law, but in fact expressly required compliance with parallel state laws and regulations).

732 (1986) (congressional determination to reduce federal regulation to allow market forces to set price pre-empts state regulation that would upset intricate cost relationships of the market); *Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984) (Agricultural Fair Practices Act pre-empts state marketing statute that undermines balanced relationship Congress sought to establish between agricultural producers and "handlers"); *Palmer v. Liggett Group*, 825 F.2d 620 (1st Cir. 1987) (state law tort action against cigarette company for failure to warn adequately of health danger was pre-empted by federal system of warning labels designed to balance national health policy of smoking education and protection of trade and commerce aspects of tobacco industry); *Baird v. General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio, E.D. 1986) (state law tort action against automobile manufacturer claiming defective design because of lack of airbags was pre-empted by federal regulatory scheme which gave manufacturers choice among three safety options in attempt to provide flexibility in development of safety technology). This is true despite the existence of a general savings clause. *See International Paper v. Ouellette*, 107 S.Ct. at 808, 812. "If the state law disturbs too much the congressionally declared scheme—whether denominated as 'occupying the field' or 'actually conflicting with federal law'—it will be displaced through the force of pre-emption." *Palmer v. Liggett Group, Inc.*, 825 F.2d at 626.

Here Congress has sought to achieve its goal, in part, by encouraging the voluntary establishment of mechanisms to settle consumer disputes fairly, expeditiously, and inexpensively. To the extent that state law interferes with the balancing of interests the F.T.C. has reached in an effort to fulfill the congressional mandate, such state law is pre-empted. *International Paper v. Ouellette*, 107 S.Ct. at 813.

3. Is there a conflict between state and federal law?

Questions of conflict arise concerning both the effect of the Lemon Law on the entire federal regulatory scheme governing manufacturers' mechanisms, and the relationship between federal and state law relating to particular aspects of those mechanisms. In determining whether the Lemon Law "stands as an obstacle" to the full purposes of Magnuson-Moss, it is not enough to say that the ultimate goal of both laws is consumer protection. *See International Paper v. Ouellette,* 107 S.Ct. at 813. A state statute is pre-empted if it interferes with the methods by which Congress sought to achieve its goal. *Id.* As discussed. Congress explicitly declared it to be its policy to encourage manufacturers to establish mechanisms voluntarily, and empowered the F.T.C. to develop regulations governing such mechanisms.

We approach the question of whether the Lemon Law frustrates congressional policy by comparing the federal and state regulations as they affect the specific workings of the mechanisms. The F.T.C. and the Lemon Law differ as to the circumstances calling for oral hearings and as to the binding or non-binding nature of mechanism decisions. The Lemon Law makes more exacting demands than the federal regulations as to the qualifications of mechanism staff, and as to the extent of recordkeeping required. It requires that mechanisms comply with the F.T.C. regulations, which are optional in the federal scheme, and it adds a requirement that consumers and arbitrators receive a copy of the "New Car Lemon Law Bill of Rights," a document outlining consumers' substantive rights and responsibilities under state law, prior to arbitration.

a. Mandatory oral hearings and binding arbitration

The Attorney General claims that *A.I.A. v. Minnesota,* in which the Court upheld a law requiring, *inter alia,* that these mechanisms allow oral hearings, is dispositive as to all the issues

in this case. Plaintiffs assert that that opinion is wrong and is being appealed, but that in any case it is distinguishable. We agree with Plaintiffs that since the Minnesota statute *requires* manufacturers to establish informal dispute settlement mechanisms (*A.I.A. v. Minnesota,* 681 F. Supp. at 1376), it cannot be attacked as obstructing the goal of *encouraging* them to do so, thus it is distinguishable.

On the issue of conflict, the Attorney General again urges upon us the decision of the Kentucky Court holding that the mandatory oral hearing provision of the Kentucky lemon law was not pre-empted by Magnuson-Moss, and the advisory opinion of the F.T.C. Staff relating to that litigation. *See Chrysler Corp. v. Armstrong,* No. 83-45, slip op. (E.D. Ky. Apr. 30, 1985) and Golden and Miller Letter, *supra,* at C-11.

The F.T.C. Staff opinion advised Kentucky's Attorney General that the state provision requiring mechanisms that otherwise comply with the federal regulations to provide for an oral hearing unless the consumer waives it created "no direct conflict with the federal law or rule." Golden and Miller Letter, *supra,* at C-11. The Court noted that this was not a Commission determination and thus was not entitled to the deference afforded under 15 U.S.C. § 2311(c)(2), but it nonetheless accepted the Staff's reasoning that: 1) the federal rule sets only minimum standards for procedure, and that a mechanism that meets its state obligations by adopting federal procedures plus oral hearings would comply with the federal rule; and 2) federal law does not prohibit non-complying mechanisms, and thus, "even if a warrantor adopts procedures under Kentucky law that actually conflict with the federal procedures, the warrantor can comply with federal law simply by refraining from incorporating the mechanism into the warranty." Golden and Miller Letter, *supra,* at C-11 n. 11. The Court opined that there were "no certain or inescapable conflicts between the Kentucky statutes and the Magnuson-Moss Act, its underlying purposes and objectives, or its implementing regulations, particularly 16 C.F.R. §

703.5(f) [allowing oral presentations only if both parties agree to it], which would require a finding of pre-emption by implication." *Chrysler Corp. v. Armstrong, supra,* No. 83-45, slip op. at 1.

Plaintiffs in the instant case claim that the federal regulations governing oral hearings and the non-binding nature of mechanism rulings bestow upon manufacturers benefits of which a state cannot divest them. The Supreme Court has recently addressed a similar problem regarding the attachment of Social Security benefits. Where "[42 U.S.C.] Section 407(a) unambiguously rules out any attempt to attach Social Security benefits" and an Arkansas statute "just as ambiguously allows the State to attach those benefits," the Court found that "this amounts to a 'conflict' under the Supremacy Clause—a conflict that the State cannot win." *Bennett v. Arkansas,* ____ U.S. ____, 108 S.Ct. 1204, 1205, 99 L.Ed.2d 455 (1988). The Kentucky Court did not have the benefit of this guidance when it rendered its decision in *Chrysler v. Armstrong.*

We perceive such a conflict with respect to the Lemon Law's provisions governing both oral hearings and the extent to which mechanism arbitration is binding. While the federal regulations explicitly state that oral presentations will be allowed only if both warrantor and consumer expressly agree to such oral presentation (16 C.F.R. § 703.5(f)(1)), the New York Lemon Law just as explicitly states that consumers, upon request, must be given an opportunity to make an oral presentation (G.B.L. § 198-a(m)(1)(i)). While federal law provides that the decision of a mechanism shall not be legally binding upon any person,[7] and simply requires that the warrantor act in good faith (16 C.F.R. §§ 703.1(g) and 703.5(j)), subject to supervision by the F.T.C. (15 U.S.C. § 2310(a)(4)), the New York Lemon Law provides

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[7] 16 C.F.R. § 703.5(j). The findings of a mechanism are, however, admissible as evidence in court. 15 U.S.C. § 2310(a)(3); 16 C.F.R. § 703.5(j).

that the manufacturer is bound by the decision of a mechanism if the consumer so elects, and that the consumer is never bound by such a decision (G.B.L. § 198-a(h)).

The oral hearing and binding arbitration provision of the New York Lemon Law cannot stand because they directly conflict with explicit provisions of federal law. From the manufacturers' perspective, what the federal law giveth, the state law taketh away, and under *Bennett v. Arkansas* the state law must fall.

Furthermore, we agree with the Plaintiffs that Congress has declared that if manufacturers establish mechanisms that meet the F.T.C.'s minimum standards, they have a federally granted right to incorporate such mechanisms into their written warranties, and to require consumers to resort to those mechanisms before pursuing in court any rights under the Act. The manufacturer cannot, however, require consumers to submit a dispute to a non-complying mechanism. 15 U.S.C. §§ 2310(a)(2) and (3); 16 C.F.R. §§ 703.2(a) and (b)(3). The Lemon Law requires mechanisms operated by New York manufacturers to adopt procedures that would make them noncomplying mechanisms under the federal regulations. If upheld, these elements of the statute would therefore deprive New York manufacturers who operate qualifying mechanisms of their federally granted right to require consumers to resort to those mechanisms.

In addition, in its attempt to balance consumers' and manufacturers' needs, the F.T.C. explicitly considered and rejected proposed regulations that called for oral hearings upon the consumer's request and for arbitration binding upon the manufacturer but not upon the consumer. As noted, the Commission sought to preserve pre-existing dispute resolution mechanisms operating at a national level. 40 Fed. Reg. at 60,209. In its decision that a mechanism "may allow" an oral presentation only if both parties expressly agree to it was largely based upon the logistical problems of these national mechanisms, which gather their information by telephone or mail. *Id.*

The F.T.C. had determined that "the need to foster a variety of Mechanisms, including national ones, is greater than the need for oral presentations at the behest of the parties." *Id.* If every state could establish different and possibly conflicting regulations binding upon any mechanism operating within its border or on behalf of its manufacturers, the federal purpose of fostering national mechanisms would be thwarted.

As to whether mechanism decisions should be binding on the warrantor alone, The F.T.C. was "not persuaded that [this approach] would benefit consumers more than it would discourage warrantors from adopting Mechanisms." 40 Fed. Reg. at 60,211. The delicate interweaving of elements of the system, and the search for balance that permeates the regulations, are evident here: it is because of the non-binding nature of mechanism decision, along with the fact that manufacturers can require the consumer to use the mechanism, that the F.T.C. refused to allow manufacturers to charge consumers a fee for submitting a dispute to a mechanism. 40 Fed. Reg. at 60,204.

The Lemon Law provisions requiring oral hearings and arbitration binding on the manufacturer but not on the consumer are destructive of this balance. By depriving the manufacturer of the right to require consumers to submit disputes to a mechanism (since a mechanism that obeyed New York law would be a noncomplying mechanism under the federal regulations), the Lemon Law would strip the federal scheme of its most potent incentive for encouraging manufacturers to create and use voluntary informal mechanisms. The added costs that these provisions would impose on manufacturers could be serious disincentives to the voluntary establishment of dispute resolution mechanisms.

These state requirements also hinder the congressional goal of increasing disclosure and improving public understanding with respect to warranties. As discussed, under Magnuson-Moss, a manufacturer is not allowed to incorporate a non-qualifying dispute resolution mechanism into the terms of its written war-

ranty. As we understand the statute (15 U.S.C. § 2310(a)(2)), the applicable regulation (16 C.F.R. § 703.2(a)), and the relevant portion of the F.T.C. Statement,[8] this means that no reference may be made in the written warranty to a non-complying mechanism. A mechanism that complies with the New York Lemon Law's oral hearing and binding arbitration requirements would be a non-complying mechanism under Magnuson-Moss.

The prohibition of any mention of a manufacturer's mechanism in the written warranty due to compliance with the Lemon Law that results in non-compliance with Magnuson-Moss would impede the congressional goal of ensuring consumer awareness of the existence of the mechanism. The F.T.C. recognized the importance of this goal and made it a focal point of the regulations concerning disclosure of the mechanism (*see* 40 Fed. Reg. 60,194-99), observing that "[t]he Senate Report on the Act stressed the Committee's belief that Mechanisms will only be useful if consumers realize they exist." *Id.* at 60,194.

While the manufacturer does have the *option* under Magnuson-Moss of establishing a non-complying mechanism that it is prohibited from mentioning in its written warranty (and that it therefore cannot make a prerequisite to suit under the Act), this flexibility serves the congressional purpose of encouraging manufacturers to establish dispute resolution mechanisms by allowing them a certain leeway in creating their mechanisms. In contrast, the Lemon Law's oral hearing and binding arbitration clauses would effectively decrease the information

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[8] It should be noted that under Section 70[3].2(a) warrantors may include information regarding their own internal procedures for handling warranty disputes. To prevent consumers from being misled into believing a Mechanism included under this provision complies with the Rule in Part 703 and must be used by the consumer, in certain instances, only complying Mechanisms can be included in the written warranty." 40 Fed. Reg. at 60,193-94.

readily available to consumers, and at the same time would serve to discourage rather than encourage the creation of such mechanisms. These provisions thus conflict with several federal goals, and with the methods designed to implement them.

b. Recordkeeping and staff qualifications

Plaintiffs attack two other provisions of the Lemon Law as hindering the congressional policy of encouraging warrantors to establish informal dispute settlement mechanisms. One requires more extensive recordkeeping than is required by the F.T.C. regulations. *Compare* G.B.L. § 198-a(m)(3) *with* 16 C.F.R. § 703.6. The other requires that mechanism staff be trained in arbitration and familiar with the Lemon Law, while the F.T.C. regulations require only that they be competent and that they act fairly and expeditiously. *Compare* G.B.L. § 198-a(m)(1)(i) *with* 16 C.F.R. § 703.3.

The Attorney General argues that these state requirements are de minimis, and that they do not conflict with the federal regulatory scheme. He directs our attention to *Hillsborough County v. Automated Medical Labs,* where operators of blood plasma centers took a position similar to that of the Plaintiffs' here, alleging that county ordinances with more stringent requirements than federal regulations under the Public Health Service Act presented a serious obstacle to the federal goal of ensuring an adequate supply of plasma. 471 U.S. at 720, 105 S.Ct. at 2378. They claimed that county fees and donor testing, donor identification, and recordkeeping requirements beyond those contained in the federal regulations would both burden plasma centers financially and reduce the number of plasma donors, resulting in an important reduction in plasma available. *Id.* The Court found, while "overly restrictive local legislation" could undoubtedly threaten the national plasma supply, the Food and Drug Administration, to which Congress had delegated the administration of the federal program, could be expected to monitor the effects of local requirements on that program on a continuing basis. *Id.* at 721, 105 S.Ct. at 2379.

As in *Hillsborough County,* Congress has here delegated to a federal agency the administration of a federal program. The F.T.C. has the authority to promulgate regulations that specifically preempt local legislation, and it can be expected to monitor the effects of state and local legislation on the federal warranty program. However, while in *Hillsborough* the F.D.A. was found not to have expressed clearly any intention that its regulations be exclusive, we have found here that the F.T.C. did make clear its intention to exercise exclusive regulatory power over voluntary dispute resolution mechanisms. In addition, more specifically related to the issue of conflict, the F.T.C. carefully considered the extent of recordkeeping and staff qualifications it would demand, and it rejected proposals involving more stringent requirements.

With respect to recordkeeping, the agency took into account concerns about cost levels and the need to preserve the confidentiality of sensitive records, and it adopted requirements consistent with the existing practices of complaint-handling bodies wherever possible. 40 Fed. Reg. at 60,211. The Commission sought to achieve its objectives of facilitating fair and efficient complaint handling, recognition of industry-wide problems, and monitoring of the mechanisms, by means of the least burdensome recordkeeping requirements possible. *Id.* After considering objections to proposed requirements, the Commission modified its proposed rule "to effect a general or overall reduction in the recordkeeping obligation." having determined that "the requirements as set forth are sufficient to meet [its] fundamental recordkeeping objectives." *Id.*

The federal regulations call for specific individual records to be maintained on each dispute, and for statistical indexes to be compiled showing the number of disputes and the degree of compliance with mechanism determinations for each warrantor. 16 C.F.R. § 703.6. The Lemon Law requires additional and different statistical information involving the kinds of remedies requested by consumers and the number of each kind awarded,

and calculation as to the average number of days required for certain stages of the process. G.B.L. §§ 198-a(m)(3). The Lemon Law obligations, while perhaps not overwhelming in an age of computer technology, are burdensome in that they require more and different information than the F.T.C. determined would provided necessary information without acting as a disincentive to the establishment of mechanisms.

With respect to staff qualifications, the basic federal requirement is that a person charged with deciding a dispute should be competent to provide fair and expeditious resolution of disputes. 16 C.F.R. § 703.3(a). The principal concern was that that person should not have any interest in the dispute that would cause him or her to be biased. *See* 40 Fed. Reg. at 60,205-06. The "competence" required by the regulations involves essentially the ability to gather the information necessary for a fair decision in each dispute. *Id.* at 60,203.

Like additional recordkeeping demands, additional training requirements would increase manufacturers' costs. Varying state recordkeeping demands and requirements that mechanism staff be versed in the workings of state lemon laws, particularly if multiplied by several states, would also impose significant burdens on mechanisms operating on a national level. The additional requirements of New York law thus endanger the balance that the F.T.C. sought to establish and preserve, as well as depriving manufacturers of their federally granted right to incorporate into their warranties and require the use of any mechanism that complies with the F.T.C.'s minimum standards.

c. Enforcement

Plaintiffs next attack the clause of the Lemon Law that requires "that the rights and procedures used in the mechanism comply with federal regulations promulgated by the federal trade commission relating to informal dispute settlement mechanisms" (G.B.L. § 198-a(m)(1)(ii)), even as the statute itself re-

quires those same mechanisms to follow procedures that conflict with those established by the F.T.C. In addition to any inherent inconsistency in the statute, there is a question as to whether the state has the power to enforce its requirement that mechanisms obey the federal regulations.

Two issues arise under this question: one is whether the state can require mechanisms to comply with federal regulations that the federal government has made optional, and the other is whether the state, through its Attorney General, has the power to oversee compliance with the federal scheme at all.

With respect to the first issue, a state law that "limit[s] the availability of an option" the federal government has created and considers essential is pre-empted because it stands as an obstacle to the fulfillment of the full purposes and objectives of Congress. *Fidelity Fed. S. & L. v. De La Cuesta,* 458 U.S. at 156, 102 S.Ct. at 3024; *see Baird v. General Motors Corp.,* 654 F. Supp. at 32-33. In the instant case, the federal government has chosen to *encourage* rather than mandate compliance by those mechanisms with federal standards. It encourages compliance by allowing manufacturers to require consumers to resort to such a mechanism before bringing suit under the Act. Neither Congress nor the F.T.C. has suggested that noncomplying mechanisms should be further penalized than by having this right denied them. To the extent G.B.L. § 198-a(m)(1)(ii) obliges manufacturers' mechanisms to comply with the otherwise optional federal regulations, it conflicts with the equilibrium established by Congress and the F.T.C., and it discourages rather than encourages the creation of mechanisms by manufacturers who are for some reason unwilling or unable to comply with the federal regulations but wish to provide some sort of optional dispute resolution procedure for their customers.

The Fourth and Seventh Circuits have spoken on the second question. The Seventh Circuit noted that the Magnuson-Moss Act provides:

> "that the United States Attorney General and the Federal Trade Commission may go to federal court to enjoin violations of the Act. 15 U.S.C. § 2310(c). Thus, the Act provides its own mechanism for protecting the general public's interest in enforcement of its provisions. It does not leave protection of the public interest up to the Attorneys General of the fifty states. *Compare* 15 U.S.C. §§ 15a-15h (explicitly vesting power in state Attorneys General to maintain actions against persons engaged in anti-competitive practices which harm state consumers)."

In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1128 n. 33 (7th Cir.) *cert. denied,* 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 (1979).

Still closer to the issue at hand, the Fourth Circuit has stated that:

> "the Magnuson-Moss Act's endorsement of private dispute settlement mechanisms . . . coupled with its mandate that the Federal Trade Commission prescribe minimum requirements for such mechanisms, evince a congressional intent to reserve to the federal regulatory body the authority to supervise whether the mechanisms are created and operated fairly."

Wolf v. Ford Motor Co., 829 F.2d at 1279.

To the extent that G.B.L. § 198-a(m)(1)(ii) purports to vest the Attorney General of the State of New York with authority to oversee compliance with the federal regulations, we find it further conflicts with the federal scheme.

d. "Bill of Rights"

Given that we have held, in accord with the Fourth Circuit, that the federal regulations have occupied the field of manufacturers' informal dispute settlement mechanisms (*see Wolf v. Ford Motor Co.*, 829 F.2d at 1279), and that we have establish-

ed a number of ways in which the state statute actually conflicts with the federal statute and regulations, we need not establish that every detail of the challenged portions of the Lemon Law conflicts with federal law. We will nonetheless point to problems attending the last aspect of the law challenged here: the requirement that consumers and arbitrators be provided with the "New Car Lemon Law Bill of Rights" upon submission of a dispute to such a mechanism.

Plaintiffs claim that the "Bill of Rights" is false and misleading in several respects, and that the requirement that a manufacturer provide it to consumers therefore turns afoul of federal law. The Magnuson-Moss Act empowers the F.T.C. to prescribe rules governing "the manner and form in which information with respect to any written warranty . . . [shall be presented] so as not to mislead the reasonable, average consumer, when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing." 15 U.S.C. § 2302(b)(1)(B). The F.T.C. states that it "encourages the disclosure of product information which is not deceptive and which may benefit consumers, and will not construe the Act to impede information disclosure in product advertising or labeling." 16 C.F.R. § 700.3(a).

As an example of false and misleading information, Plaintiffs cite the first point in the Bill of Rights, which states that: "In addition to any warranties offered by the manufacturer, your new car is warranted against all material defects for eighteen thousand miles or two years, whichever comes first." G.B.L. § 198-a(m)(2)(1). Plaintiffs say that this would mislead the average consumer because it suggests: 1) that the statutory warranty exists irrespective of whether the manufacturer has furnished "express warranties," which is not true; 2) that the statutory warranty is unconditional, which is not true because it depends upon "terms or conditions precedent" that the manufacturer may have imposed; 3) that there is warranty coverage for all parts of a motor vehicle, which is not true; and 4) that only material defects are covered, which is not necessarily true.

The Attorney General replies that Plaintiffs misconstrue both the state and the federal law. He says that Point I of the "Bill of Rights" is designed to be a simple and concise summary of the law to give notice to consumers of their general rights under the Lemon Law, and is of course limited by the actual substantive text of that statute, to which the consumer must also look. He claims that 15 U.S.C. § 2302(b)(1)(B) imposes no affirmative obligations, but simply empowers the F.T.C. to act, and that 16 C.F.R. 700.3(a) does nothing more than encourage the nondeceptive disclosure of product information. Thus, he claims, the Lemon Law does not require manufacturers to do anything directly prohibited by the Act or the regulations.

It appears to us that 15 U.S.C. § 2302(b)(1)(B) applies to written materials designed to induce a buyer to purchase the consumer good, rather than to information designed to make the buyer aware of state-provided rights and responsibilities at a time that is by definition after the purchase. It also appears to us that 16 C.F.R. § 700.3(a) applies to product information rather than legal information. Nonetheless, we disagree with the Attorney General to the extent that he suggests that the federal statute does not impose any affirmative obligation to refrain from providing false and misleading information in written representations outside the written warranty. However, we do not here decide whether the information required by the "Bill of Rights" is false and misleading, or what the result would be if it were. Rather we base our decision that this requirement is pre-empted on the fact that it is an element of the state's attempt to govern in an area in which it is precluded from acting.

We also find invalid G.B.L. § 198-a(g) because it requires manufacturers' informal dispute resolution mechanisms to comply with state laws that we have here held pre-empted.

It may be noted that there is some ambiguity as to the status on non-complying mechanisms under Magnuson-Moss, what

rules they must follow, and who has authority to oversee them. We do not undertake to answer those questions, as the answers would not affect our decision with respect to the offending clauses of the statute here.

We find that the challenged provisions of the New York Lemon Law "stand as an obstacle to" the explicit congressional goal of encouraging manufacturers to establish voluntary mechanisms. The F.T.C. strove to balance the needs of manufacturers with the needs of consumers, and fashioned a delicate equilibrium which, even if considered by a state to be imperfect, is aimed at furthering the congressional purpose of encouraging such mechanisms.

Here, Plaintiffs not only claim that the New York Lemon Law could discourage manufacturers from establishing mechanisms, but also they present evidence that it has already caused two automobile manufacturers, Nissan and General Motors, to stop sponsoring or participating in voluntary mechanisms in New York although they continue to offer such programs in other states. *See* Declaration of Douglas Lawrence, National Warranty Manager for Nissan Motor Corp., U.S.A., in suport of Plaintiffs' motion, dated Oct 14, 1987; Declaration of Richard J. Bugno, General Director, Service Operations for General Motors Corp., in support of Plaintiffs' motion, dated Feb. 2, 1988.

The Attorney General calls these affidavits "conclusory and self-serving," and points out that lemon laws with similar provisions exist in other states in which manufactures, including Nissan and G.M., have not writhdrawn from participating in mechanisms. He also provides numerous examples of manufacturers that still participate in mechanisms in New York, and thus appeal willing to abide by the strictures of the Lemon Law.

We do not base our decision upon the facts presented with respect to this issue, but on the law as explained above. We simply note: 1) that Plaintiffs allege that the reason other New

York manufacturers have so far continued to offer their pre-existing programs is that the Attorney General has agreed to refrain from prosecuting them under the Lemon Law until this case is decided; and 2) that the Attorney General has not suggested other, unrelated factors that might explain why Nissan and G.M. have ended their programs.

SEVERABILITY

The question arises whether the elements of the Lemon Law that regulate manufacturers' informal dispute settlement mechanisms are severable from the Lemon Law as a whole. Severability is determined by state law. *See Watson v. Buck,* 313 U.S. 387, 395-96, 61 S.Ct. 962, 964, 85 L.Ed.2d 1416 (1941). Under New York law, invalid parts of a statute "may be severed from the remainder if . . . the remaining portions are sufficient to effect the legislative purpose deductible from the entire act," unless "the valid and invalid portions are so interwoven that neither can stand alone." N.Y. Statutes, § 150(d) (McKinney 1971) (footnotes omitted); *see Environmental Encapsulating Corp. v. City of New York,* 855 F.2d 48, 59-60 (2d Cir. 1988).

The 1986 amendments governing manufacturers' dispute resolution mechanisms are certainly severable from the rest of the Lemon Law. They were appended to a statute which can without them, continue to fulfill its purpose of protecting consumers by permitting them "to obtain more effective redress if defects substantially impairing the value of a new motor vehicle are not fixed after a reasonable number of attempts." R. Givens, *Practice Commentary* to G.B.L. § 198-a (McKinney 1988) at 311. In saying this, we do not pre-judge the constitutionality of other aspects of that statute under the Commerce Clause, a matter which is also before us in this case.

We note that the Lemon Law also provides for an alternate, state-run dispute resolution procedure, to which a consumer can present any dispute arising under the Lemon Law. G.B.L. § 198-a(k). A manufacturer is obliged to submit to this alternate

arbitration when a consumer has made such an application and paid the filing fee. *Id.* Responsibility for promulgating regulations to implement this program is delegated to the New York Attorney General. *Id.* Thus New York has provided for a dispute resolution system that operates entirely under its aegis and which the state has full authority. *See Chrysler Corp. v. Texas Motor Vehicle Comm'n,* 755 F.2d at 1205-06.

Thus, we sever §§ 198-1(g), (h), and (m) from the remainder of the New York Lemon Law, and hold them pre-empted by the Magnuson-Moss Act and regulation promulgated thereunder.

Accordingly, the Attorney General's motion to dismiss is denied and the Plaintiff's motion for partial summary judgment is granted.

SO ORDERED.

APPENDIX C-1

Title I, Magnuson-Moss Warranty — Federal Trade Commission Improvement Act, P.L. 93-637

15 U.S.C. § 2301. Definitions

For the purposes of this chapter:

(1) The term "consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

(2) The term "Commission" means the Federal Trade Commission.

(3) The term "consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).

(4) The term "supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers.

(5) The term "warrantor" means any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.

(6) The term "written warranty" means —

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking.

which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

(7) The term "implied warranty" means an implied warranty arising under State law (as modified by sections 2308 and 2304(a) of this title) in connection with the sale by a supplier of a consumer product.

(8) The term "service contract" means a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product.

(9) The term "reasonable and necessary maintenance" consists of those operations (A) which the consumer reasonably can be expected to perform or have performed and (B) which are necessary to keep any consumer product performing its intended

function and operating at a reasonable level of performance.

(10) The term "remedy" means which ever of the following actions the warrantor elects:

(A) repair,

(B) replacement, or

(C) refund;

except that the warrantor may not elect refund unless (i) the warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or (ii) the consumer is willing to accept such refund.

(11) The term "replacement" means furnishing a new consumer product which is identical or reasonably equivalent to the warranted consumer product.

(12) The term "refund" means refunding the actual purchase price (less reasonable depreciation based on actual use where permitted by rules of the Commission).

(13) The term "distributed in commerce" means sold in commerce, introduced or delivered for introduction into commerce, or held for sale or distribution after introduction into commerce.

(14) The term "commerce" means trade, traffic, commerce, or transportation —

(A) between a place in a State and any place outside thereof, or

(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A)

(15) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Canal Zone, or American Samoa. The term "State law" includes a law of the United States applicable to the District of Columbia or only to a territory or possession of the United States; and the term "Federal law" excludes any State law.

(Pub. L. 93-637, Title I, § 101, Jan. 4, 1975, 88 Stat. 2183).

§ 2310 Remedies in consumer disputes

(a) (1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.

(2) The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

(3) One or more warrantors may establish an informal dispute settlement procedure which meets the requirements of the Commission's rules under paragraph (2). If

(A) a warrantor establishes such a procedure,

(B) such procedure, and its implementation, meets the requirements of such rules, and

(C) he incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty.

then (i) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he

initially resorts to such procedure; and (ii) a class of consumers may not proceed in a class action under subsection (d) of this section except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the named plaintiffs (upon notifying the defendant that they are named plaintiffs in a class action with respect to a warranty obligation) initially resort to such procedure. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure. In any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence.

(4) The Commission on its own initiative may, or upon written complaint filed by any interested person shall, review the bona fide operation of any dispute settlement procedure resort to which is stated in a written warranty to be a prerequisite to pursuing a legal remedy under this section. If the Commission finds that such procedure or its implementation fails to comply with the requirements of the rules under paragraph (2), the Commission may take appropriate remedial action under any authority it may have under this chapter or any other provision of law.

(5) Until rules under paragraph (2) take effect, this subsection shall not affect the validity of any informal dispute settlement procedure respecting consumer warranties, but in any action under subsection (d) of this section, the court may invalidate any such procedure if it finds that such procedure is unfair.

(b) It shall be a violation of section 45 (a)(1) of this title for any person to fail to comply with any requirement imposed on such person by this chapter (or a rule thereunder) or to violate any prohibition contained in this chapter (or a rule thereunder).

(c) (1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission by any of its attorneys designated by it for such purpose, to restrain

(A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any requirement imposed on such person by or pursuant to this chapter or from violating any prohibition contained in this chapter. Upon proper showing that, weighing the equities and considering the Commission's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an action brought by the Commission, if a complaint under section 45 of this title is not filed within such period (not exceeding 10 days) as may be specified by the court after the issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect. Any suit shall be brought in the district in which such person resides or transacts business. Whenever it appears to the court that the ends of justice require that other persons should be parties in the action, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and to that end process may be served in any district.

(2) For the purposes of this subsection, the term "deceptive warranty" means (A) a written warranty, which (i) contains an affirmation, promise, description, or representation which is either false or fraudulent, or which, in light of all the circumstances, would mislead a reasonable individual exercising due care; or (ii) fails to contain information which is necessary in light of all the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or (B) a written warranty created by the use of such terms as "guaran-

ty" or "warranty", if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.

(d) (1) Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief

(A) in any court of competent jurisdiction in any State of the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably in commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection-

(A) if the amount in controversy of any individual claim is less than the sum or value of $25;

(B) if the amount in controversy is less than the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

(e) No action (other than a class action or an action respecting a warranty to which subsection (a)(3) of this section applies) may be brought under subsection (d) of this section for failure to comply with any obligation under any written or implied warranty or service contract, and a class of consumers may not proceed in a class action under such subsection with respect to such a failure except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply. In the case of such a class action (other than a class action respecting a warranty to which subsection (a)(3) of this section applies) brought under subsection (d) of this section for breach of any written or implied warranty or service contract, such reasonable opportunity will be afforded by the named plaintiffs and they shall at that time notify the defendant that they are acting on behalf of the class. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure.

(f) For purposes of this section, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person.

(Pub.L. 93-637, Title I, § 110, Jan. 4, 1975, 88 Stat. 2189.)

§2311. Applicability to other laws

(a) (1) Nothing contained in this chapter shall be construed to repeal, invalidate, or supersede the Federal Trade Commission Act or any statute defined therein as an Antitrust Act.

(2) Nothing in this chapter shall be construed to repeal, invalidate, or supersede the Federal Seed Act and nothing in this chapter shall apply to seed for planting.

(b) (1) Nothing in this chapter shall invalidate or restrict and right or remedy of any consumer under State law or any other Federal law.

(2) Nothing in this chapter (other than sections 2308 and 2304 (a)(2) and (4) of this title) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

(c) (1) Except as provided in subsection (b) of this section and in paragraph (2) of this subsection, a State requirement-

(A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;

(B) which is within the scope of an applicable requirement of sections 2302, 2303, and 2304 of this title (and rules implementing such sections), and

(C) which is not identical to a requirement of section 2302, 2303, or 2304 of this title (or a rule thereunder),

shall not be applicable to written warranties complying with such sections (or rules thereunder).

(2) If, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with section 2309 of this title) that any requirement of such State covering any transaction to which this chapter applies (A) affords protection to consumers greater than the requirements of this chapter and (B) does not unduly burden interstate commerce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for so long as the State administers and enforces effectively any such greater requirement.

(d) This chapter (other than section 2302(c) of this title) shall be inapplicable to any written warranty the making or content of which is otherwise governed by Federal law. If only a portion of a written warranty is so governed by Federal law, the remaining portion shall be subject to this chapter.

(Pub. L. 93-637, Title I, § 111, Jan. 4, 1975, 88 Stat. 2192.)

Appendix C-2

Federal Trade Commission-Informal Dispute Settlement Procedures

16 C.F.R. § 703.1 Definitions.

(a) "The Act" means the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 2301, *et seq.*

(b) "Consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

(c) "Written Warranty" means:

(1) Any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(2) Any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

(d) "Warrantor" means any person who gives or offers to give a written warranty which incorporates an informal dispute settlement mechanism.

(e) "Mechanism" means an informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of Title I of the Act applies, as provided in section 110 of the Act.

(f) "Members" means the person or persons within a mechanism actually deciding disputes.

(g) "Consumer" means a buyer (other than for purposes of resale) of any consumer product, any person whom such product is transferred during the duration of a written warranty applicable to the product, an any other person who is entitled by the terms of such warranty or under applicable state law to enforce against the warrantor the obligations of the warranty.

(h) "On the fact of the warranty" means:

(1) If the warranty is a single sheet with printing on both sides of the sheet, or if the warranty is comprised of more than one sheet, the page on which the warranty text begins;

(2) If the warranty is included as part of a longer document, such as a use and care manual, the page in such document on which the warranty text begins.

§ 703.2 Duties of warrantor

(a) The warrantor shall not incorporate into terms of a written warranty a Mechanism that fails to comply with the requirements contained in §§ 703.3 through 703.8 of this part. This paragraph shall not prohibit a warrantor from incorporating into the terms of a written warranty the step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty as described in section 102 (a)(7) of the Act and required by Part 701 of the subchapter.

(b) The warrantor shall disclose clearly and conspicuously at least the following information on the face of the written warranty:

(1) A statement of the availability of the informal dispute settlement mechanism;

(2) The name and address of the Mechanism, or the name and a telephone number of the Mechanism which consumers may use without charge;

(3) A statement of any requirement that the consumer resort to the Mechanism before exercising rights or seeking remedies created by Title I of the Act; together with the disclosure that if a consumer chooses to seek redress by pursuing rights and remedies not created by Title I of the Act, resort to the Mechanism would not be required by any provision of the Act; and

(4) A statement, if applicable, indicating where further information on the Mechanism can be found in materials accompanying the product, as provided in § 703.2(c) of this section.

(c) The warrantor shall include in the written warranty or in a separate section of materials accompanying the product, the following information:

(1) Either (i) a form addressed to the Mechanism containing spaces requesting the information which the Mechanism may require for prompt resolution of warranty disputes; or (ii) a telephone number of the Mechanism which consumers may use without charge;

(2) The name and address of the Mechanism;

(3) A brief description of Mechanism procedures;

(4) The time limits adhered to by the Mechanism; and

(5) The types of information which the Mechanism may require for prompt resolution of warranty disputes.

(d) The warrantor shall take steps reasonably calculated to make consumers aware of the Mechanism's existence at the time

consumers experience warranty disputes. Nothing contained in paragraphs (b), (c), or (d) of this section shall limit the warrantor's option to encourage consumers to seek redress directly from the warrantors as long as the warrantor does not expressly require consumers to seek redress directly from the warrantor. The warrantor shall proceed fairly and expeditiously to attempt to resolve all disputes submitted directly to the warrantor.

(e) Whenever a dispute is submitted directly to the warrantor, the warrantor shall, within a reasonable time, decide whether, and to what extent, it will satisfy the consumer, and inform the consumer of its decision. In its notification to the consumer of its decision, the warrantor shall include the information required in § 703.2 (b) and (c) of this section.

(f) The warrantor shall: (1) Respond fully and promptly to reasonable requests by the Mechanism for information relating to disputes;

(2) Upon notification of any decision of the Mechanism that would require action of the part of the warrantor, immediately notify the mechanism whether, and to what extent, warrantor will abide by the decision; and

(3) Perform any obligations it has agreed to.

(g) The warrantor shall act in good faith in determining whether, and to what extent, it will abide by a Mechanism decision.

(h) The warrantor shall comply with any reasonable requirements imposed by the Mechanism to fairly and expeditiously resolve warranty disputes.

MINIMUM REQUIREMENTS OF THE MECHANISM

§ 703.3 Mechanism organization

(a) The Mechanism shall be funded and competently staffed at a level sufficient to ensure fair and expeditious resolution of

all disputes, and shall not charge consumers any fee for use of the Mechanism.

(b) The warrantor and the sponsor of the Mechanism (if other than the warrantor) shall take all steps necessary to ensure that the Mechanism, and its members and staff, are sufficiently insulated from the warrantor and the sponsor, so that the decisions of the members and the performance of the staff are not influenced by either the warrantor or the sponsor. Necessary steps shall include, at a minimum, committing funds in advance, basing personnel decisions solely on merit, and not assigning conflicting warrantor or sponsor duties to Mechanism staff persons.

(c) The Mechanism shall impose any other reasonable requirements necessary to ensure that the members and staff act fairly and expeditiously in each dispute.

§ 703.4 Qualifications of members

(a) No member deciding a dispute shall be: (1) A party to the dispute, or an employee or agent of a party other than for purposes of deciding disputes; or

(2) A person who is or may become a party in any legal action, including but not limited to class actions, relating to the product or complaint in dispute, or an employee or agent of such person other than for purposes of deciding disputes. For purposes of this paragraph (a) a person shall not be considered a "party" solely because he or she acquires or owns an interest in a party solely for investment, and the acquisition or ownership of an interest which is offered to the general public shall be prima facie evidence of its acquisition or ownership solely for investment.

(b) When one or two members are deciding a dispute, all shall be persons having no direct involvement in the manufacture, distribution, sale or service or any product. When three or more members are deciding a dispute, at least two-thirds shall

be persons having no direct involvement in the manufacture, distribution, sale or service of any product. "Direct involvement" shall not include acquiring or owning an interest solely for investment, and the acquisition or ownership of an interest which is offered to the general public shall be prima facie evidence of its acquisition or ownership solely for investment. Nothing contained in this section shall prevent the members from consulting with any persons knowledgeable in the technical, commercial or other areas relating to the product which is the subject of the dispute.

(c) Members shall be persons interested in the fair and expeditious settlement of consumer disputes.

§ 703.5 Operation of the Mechanism

(a) The Mechanism shall establish written operating procedures which shall include at least those items specified in paragraphs (b) through (j) of this section. Copies of the written procedures shall be made available to any person upon request.

(b) Upon notification of a dispute, the Mechanism shall immediately inform both the warrantor and the consumer of receipt of the dispute.

(c) The Mechanism shall investigate, gather and organize all information necessary for a fair and expeditious decision in each dispute. When any evidence gathered by or submitted to the mechanism raises issues relating to the number of repair attempts, the length of repair periods, the possibility of unreasonable use of the product, or any other issues relevant in light of Title I of the Act (or rules thereunder), including issues relating to consequential damages, or any other remedy under the Act (or rules thereunder), the Mechanism shall investigate these issues. When information which will or may be used in the decision, submitted by one party, or a consultant under § 703.4 (b) of this part, or any other source tends to contradict facts submitted by the other party, the Mechanism shall clearly, ac-

curately, and completely disclose to both parties the contradictory information (and its source) and shall provide both parties an opportunity to explain or rebut the information and to submit additional materials. The Mechanism shall not require any information not reasonably necessary to decide the dispute.

(d) If the dispute has not been settled, the Mechanism shall, as expeditiously as possible but at least within 40 days of notification of the dispute, except as provided in paragraph (e) of this section:

(l) Render a fair decision based on the information gathered as described in paragraph (c) of this section, and on any information submitted at an oral presentation which conforms to the requirements of paragraph (f) of this section (A decision shall include any remedies, replacement, refund, reimbursement for expenses, compensation for damages, and any other remedies avialable under the written warranty or the Act (or rules thereunder); and a decision shall state a specified reasonable time for performance);

(2) Disclose to the warrantor its decision and the reasons therefor;

(3) If the decision would require action on the part of the warrantor, determine whether, and to what extent, warrantor will abide by its decision; and

(4) Disclose to the consumer its decision, the reasons therefor, warrantor's intended additions (if the decision would require action on the part of the warrantor), and the information described in paragraph (g) of this section. For purposes of paragraph (d) of this section a dispute shall be deemed settled when the Mechanism has ascertained from the consumer that:

(i) The dispute has been settled to the consumer's satisfaction; and (ii) the settlement contains a specified reasonable time for performance.

(e) The Mechanism may delay the performance of its duties under paragraph (d) of this section beyond the 40 day time limit:

(1) Where the period of delay is due solely to failure of a consumer to provide promptly his or her name and address, brand name and model number of the product involved, and a statement as to the nature of the defect or other complaint; or

(2) For a 7 day period in these cases where the consumer has made no attempt to seek redress directly from the warrantor.

(f) The Mechanism may allow an oral presentation by a party to a dispute (or a party's representative) only if: (1) both warrantor and consumer expressly agree to the presentation;

(2) Prior to agreement the Mechanism fully discloses to the consumer the following information:

(i) That the presentation by either party will take place only if both parties so agree, but that if they agree, and one party fails to appear at the agreed upon time and place, the presentation by the other party may still be allowed;

(ii) That the members will decide the dispute whether or not an oral presentation is made;

(iii) The proposed date, time and place for the presentation, and

(iv) A brief description of what will occur at the presentation including, if applicable, parties' rights to bring witnesses and/or counsel; and

(3) Each party has the right to be present during the other party's oral presentation. Nothing contained in this paragraph (b) of this section shall preclude the Mechanism from allowing an oral presentation by one party, if the other party fails to appear at the agreed upon time and place, as long as all of the requirements of this paragraph have been satisfied.

(g) The Mechanism shall inform the consumer, at the time of disclosure required in paragraph (d) of this section that:

(1) If he or she is dissatisfied with its decision or warrantor's intended actions, or eventual performance, legal remedies, including use of small claims court, may be pursued;

(2) The Mechanism's decision is admissible in evidence as provided in section 110 (a)(3) of the Act; and

(3) The consumer may obtain, at reasonable cost, copies of all Mechanism records relating to the consumer's dispute.

(h) If the warrantor has agreed to perform any obligations, either as part of a settlement agreed to after notification to the Mechanism of the dispute or as a result of a decision under paragraph (d) of this section, the Mechanism shall ascertain from the consumer within 10 working days of the date for performance whether performance has occurred.

(i) A requirement that a consumer resort to the Mechanism prior to commencement of an action under section 110(d) of this section, whichever occurs sooner. Except that, if the Mechanism delays performance of its paragraph (d) of this section duties as allowed by paragraph (e) of this section, the requirement that the consumer initially resort to the Mechanism shall not be satisfied until the period of delay allowed by paragraph (e) of this section has ended.

(j) Decisions of the Mechanism shall not be legally binding on any person. However, the warrantor shall act in good faith, as provided in § 703.2(g) of this part. In any civil action arising out of a warranty obligation and relating to a matter considered by the Mechanism, any decision of the Mechanism shall be admissible in evidence, as provided in section 110 (a)(3) of the Act.

§ 703.6 Recordkeeping

(a) The Mechanism shall maintain records on each dispute referred to it which shall include;

(1) Name, address and telephone number of the consumer;

(2) Name, address, telephone number and contact person of the warrantor;

(3) Brand name and model number of the product involved;

(4) The date of receipt of the dispute and the date of disclosure to the consumer of the decision;

(5) All letters or written documents submitted by either party;

(6) All other evidence collected by the Mechanism relating to the dispute, including summaries of relevant and material portions of telephone calls and meetings between the Mechanism and any other person (including consultants described in § 703.4(b) of this part);

(7) A summary of any relevant and material information presented by either party at an oral presentation;

(8) The decision of the members including information as to date, time and place of meeting, and the identity of members voting; or information on any other resolution;

(9) A copy of the disclosure to the parties of the decision; (10) A statement of the warrantor's intended action(s);

(11) Copies of follow-up letters (or summaries of relevant and material portions of follow-up telephone calls) to the consumer, and responses thereto; and

(12) any other documents and communications (or summaries of relevant and material portions of oral communications) relating to the dispute.

(b) The Mechanism shall maintain an index of each warrantor's disputes grouped under brand name and sub-grouped under product model.

(c) The Mechanism shall maintain an index for each warrantor as will show:

(1) All disputes in which the warrantor has promised some performance (either by settlement or in response to a Mechanism decision) and has failed to comply; and

(2) All disputes in which the warrantor has refused to abide by a Mechanism decision.

(d) The Mechanism shall maintain an index as will show all disputes delayed beyond 40 days.

(e) The Mechanism shall compile semi-annually and maintain statistics which show the number and percent of disputes in each of the following categories:

(1) Resolved by staff of the Mechanism and warrantor has complied;

(2) Resolved by staff of the Mechanism,, time for compliance has occurred, and warrantor has not complied;

(3) Resolved by staff of the Mechanism and time for compliance has not yet occurred;

(4) Decided by members and warrantor has complied;

(5) Decided by members, time for compliance has occurred, and warrantor has not yet complied;

(6) Decided by members and time for compliance has not yet occurred;

(7) Decided by members adverse to the consumer.

(8) No jurisdiction;

(9) Decision delayed beyond 40 days under § 703.5 (e) (1) of this part;

(10) Decision delayed beyond 40 days under § 703.5 (e) (2) of this part;

(11) Decision delayed beyond 40 days for any other reason, and

(12) Pending decision.

(f) The Mechanism shall retain all records specified in paragraphs (a) through (e) of this section for at least 4 years after final disposition of the dispute;

§ 703.7 Audits

(a) The Mechanism shall have an audit conducted at least annually, to determine whether the Mechanism and its implementation are in compliance with this part. All records of the Mechanism required to be kept under § 703.6 of this part shall be available for audit.

(b) Each audit provided for in paragraph (a) of this section shall include at a minimum the following:

(1) Evaluation of warrantors' efforts to make consumers aware of the Mechanism's existence as required in § 703.2 (d) of this part;

(2) Review of the indexes maintained pursuant to § 703.6 (b), (c), and (d) of this part; and

(3) Analysis of a random sample of disputes handled by the Mechanism to determine the following:

(i) Adequacy of the Mechanism's complaint and other forms, investigation, mediation and follow-up efforts, and other aspects of complaint handling; and

(ii) Accuracy of the Mechanism's statistical compilations under § 703.6(e) of this part. (For purposes of this subparagraph "analysis" shall include oral or written contact with the consumers involved in each of the disputes in the random sample.)

(c) A report of each audit under this section shall be submitted to the Federal Trade Commission, and shall be made

available to any person at reasonable cost. The Mechanism may direct its auditor to delete names of parties to disputes, and identity of products involved, from the audit report.

(d) Auditors shall be selected by the Mechanism. No auditor may be involved with the Mechanism as a warrantor, sponsor or member, or employee or agent thereof, other than for purposes of the audit.

§ 703.8 Openness of records and proceedings.

(a) The statistical summaries specified in § 703.6 (e) of this part shall be available to any person for inspection and copying.

(b) Except as provided under paragraphs (a) and (e) of this section, and paragraph (c) of § 703.7 of this part, all records of the Mechanism may be kept confidential, or made available only on such terms and conditions, or in such form, as the Mechanism shall permit.

(c) The policy of the Mechanism with respect to records made available at the Mechanism's option shall be set out in the procedures under § 703.5 (a) of this part; the policy shall be applied uniformly to all requests for access to or copies of such records.

(d) Meeting of the members to hear and decide disputes shall be open to observers on reasonable and non-discriminatory terms. The identity of the parties and products involved in disputes need not be disclosed at meetings.

(e) Upon request the Mechanism shall provide to either party to a dispute:

(1) Access to all records relating to the dispute; and

(2) Copies of any records relating to the dispute, at reasonable cost.

(f) The Mechanism shall make available to any person upon request, information relating to the qualifications of Mechanism staff and members.

APPENDIX C-3

New York Lemon Law (N.Y. Gen. Bus. L. § 198-a)

§ 198.-a. Warranties.

(a) As used in this section:

(1) "Consumer" means the purchaser, other than for purposes of resale, or the lessee of a motor vehicle normally used for personal family, or household purposes and subject to a manufacturer's express warranty, any person to whom such motor vehicle is transferred during the duration of an express warranty applicable to such motor vehicle, and any other person entitled by the terms of such warranty to enforce the obligations of the warranty;

(2) "Motor vehicle" mean a motor vehicle excluding motorcycles and off-road vehicles, which is sold and registered in this state; provided, however, that with respect to motor homes, that portion of the motor home devoted to its propulsion including its chassis shall be deemed a motor vehicle, while that portion of a motor home designed, used or maintained primarily as a mobile dwelling shall not be deemed a motor vehicle for purposes of this section; and

(3) "Manfacturer's express warranty" or "warranty" means the written warranty, so labeled, of the manufacturer of a new automobile, including any terms or conditions precedent to the enforcement of obligations under that warranty.

(4) "Mileage deduction formula" means the mileage which is in excess of twelve thousand miles times the purchase price, or the lease price if applicable, of the vehicle divided by one hundred thousand miles.

(6) "Lease price" means the aggregate of:

(i) the lessor's actual purchase cost;

(ii) the freight cost, if applicable;

(iii) the cost of accessories if applicable;

(iv) any fee paid to another to obtain the lease; and

(v) an amount equal to five percent of the lessor's actual purchase cost as prescribed in subparagraph (i) of this paragraph.

(7) "Service fees" means the portion of a lease payment attributable to:

(i) an amount for earned interest calculated on the rental payments previously paid to the lessor for the leased vehicle at an annual rate equal to two points above the prime rate in effect on the date of the execution of the lease; and

(ii) any insurance or other costs expended by the lessor for the benefit of the lessee.

(8) "Capitalized cost" means the aggregate deposit and rental payments previously paid to the lessor for the leased vehicle less service fees.

(b) If a new motor vehicle does not conform to all express warranties during the first eighteen thousand miles of operation or during the period of two years following the date of original delivery of the motor vehicle to such consumer, whichever is the earlier date, the consumer shall during such period report the nonconformity, defect or condition to the manufacturer, its agent or its authorized dealer. If the notification is received by the manufacturer's agent or authorized dealer, the agent or dealer shall within seven days forward written notice thereof to the manufacturer by certified mail, return receipt requested. The manufacturer, its agent or its authorized dealer shall correct said nonconformity, defect or condition at no charge to the consumer, notwithstanding the fact that such repairs are made after the expiration of such period of operation or such two year period.

(c)(1) If, within the period specified in subdivision (b) of this section, the manufacturer or its agents or authorized dealers are

unable to repair or correct any defect or condition which substantially impairs the value of the motor vehicle to the consumer after a reasonable number of attempts, the manufacturer, at the option of the consumer, shall replace the motor vehicle with a comparable motor vehicle, or accept return of the vehicle from the consumer and refund to the consumer the full purchase price or, if applicable, the lease price and any trade in allowance plus fees and charages. Such fees and charges shall include but not be limited to all license fees, registration fees and any similar governmental charges, less an allowance for the consumer's use of the vehicle in excess of the first twelve thousand miles of operation pursuant to the mileage deduction formula defined in paragraph four of subdivision (a) of this section, and a reasonable allowance for any damage not attributable to normal wear or improvements.

(2) A manufacturer which accepts return of the motor vehicle because the motor vehicle does not conform to its warranty shall notify the commissioner of the department of motor vehicles that the motor vehicle was returned to the manufacturer for nonconformity to this warranty and shall disclose, in accordance with the provisions of section four hundred seventeen-a of the vehicle and traffic law prior to resale either at wholesale or retail, that it was previously returned to the manufacturer for nonconformity to its warranty. Refunds shall be made to the consumer and lienholder, if any, as their interests may appear on the records of ownership kept by the department of motor vehicles. Refunds shall be accompanied by the proper application for credit or refund of state and local sales taxes as published by the department of taxation and finance and by a notice that the sales tax paid on the purchase price, lease price or portion thereof being refunded is refundable by the state tax commission in accordance with the provisions of subdivision (f) of section eleven hundred thirty-nine of the tax law. If applicable, refunds shall be made to the lessor and lessee as their interest may appear on the records of ownership kept by the department of motor vehicles, as follows: the lessee shall receive the

capitalized cost and the lessor shall receive the lease price less the aggregate deposit and rental payments previously paid to the lessor for the leased vehicle. Refunds shall be accompanied by the proper application form for credit or refund of state and local sales tax as published by the department of taxation and finance and a notice that the sales tax paid on the lease price or portion thereof being refunded is refundable by the state tax commission in accordance with the provisions of subdivision (f) of section eleven hundred thirty-one of the tax law.

(3) It shall be affirmative defense to any claim under this section that:

(i) the nonconformity, defect or condition does not substantially impair such value; or

(ii) the nonconformity, defect or condition is the result of abuse, neglect or unauthorized modifications or alterations of the motor vehicle.

(d) It shall be presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to the applicable express warranties, if:

(1) the same nonconformity, defect or condition has been subject to repair four or more times by the manufacturer or its agents or authorized dealers within the first eighteen thousand miles of operation or during the period of two years following the date or original delivery of the motor vehicle to a consumer, whichever is the earlier date, but such nonconformity, defect or condition continues to exist; or

(2) the vehicle is out of service by reason of repair of one or more nonconformities, defects or conditions for a cumulative total of thirty or more calendar days during either period, whichever is the earlier date.

(e) The term of an express warranty, the two year warranty period and the thirty day out of service period shall be extended

by any time during which repair services are not available to the consumer because of a war, invasion or strike, fire, flood or other natural disaster.

(f) Nothing in this section shall in any way limit the rights or remedies which are otherwise available to a consumer under any other law.

(g) If a manufacturer has established an informal dispute settlement mechanism, such mechanism shall comply in all respects with the provisions of this section and the provisions of subdivision (c) of this section concerning refunds or replacement shall not apply to any consumer who has not first resorted to such mechanism. In the event that an arbitrator in such an informal dispute mechanism awards a refund or replacement vehicle, he or she shall not reduce the award to an amount less than the full purchase price or the lease price, if applicable, or a vehicle of equal value, plus all fees and charges except to the extent such reductions are specifically permitted under subdivision (c) of this section.

(h) A manufacturer shall have up to thirty days from the date the consumer notifies the manufacturer of his or her acceptance of the arbitrator's decision to comply with the terms of that decision. Failure to comply with the thirty day limitation shall also entitle the consumer to recover a fee of twenty-five dollars for each business day of noncompliance up to five hundred dollars. Provided, however, that nothing contained in this subdivision shall impose any period is attributable to a consumer who has requested a replacement vehicle built to order or with options that are not comparable to the vehicle being replaced or otherwise made compliance impossible within said period. In no event shall a consumer who has resorted to an informal dispute settlement mechanism be precluded from seeking the rights or remedies available by law.

(i) Any agreement entered into by a consumer for the purchase of a new motor vehicle which waives, limits or disclaims

the rights set forth in this section shall be void as contrary to public policy. Said rights shall inure to a subsequent transferee of such motor vehicle.

Any provision of any agreement entered into by a consumer for the purchase of a new motor vehicle which includes as an additional cost for such motor vehicle an expense identified as being for the purpose of affording such consumer his or her rights under this section, shall be void as contrary to public policy.

(j) Any action brought pursuant to this section shall be commenced within four years of the date of original delivery of the motor vehicle to the consumer.

(k) Each consumer shall have the option of submitting any dispute arising under this section upon the payment of a prescribed filing fee to an alternate arbitration mechanism established pursuant to regulations promulgated hereunder by the New York State attorney general. Upon application of the consumer and payment of the filing fee, all manufacturers shall submit to such alternate arbitration.

Such alternate arbitration shall be conducted by a professional arbitrator or arbitration firm appointed by and under regulations established by the New York state attorney general. Such mechanism shall insure the personal objectivity of its arbitrators and the right of each party to present its case, to be in attendance during any presentation made by the other party and to rebut or refute such presentation. In all other respects, such alternate arbitration mechanism shall be governed by article seventy-five of the civil practice law and rules.

(l) A court may award reasonable attorney's fees to a prevailing plaintiff.

(m)(1) Each manufacturer shall require that each informal dispute settlement mechanism used by it provide, at a minimum, the following:

(i) that the arbitrators participating in such mechanism are trained in arbitration and familiar with the provisions of this section, that the arbitrators and consumers who request arbitration are provided with a written copy of the provisions of this section, together with the notice set forth below entitled "NEW CAR LEMON LAW BILL OF RIGHTS," and that consumers, upon request, are given an opportunity to make an oral presentation to the arbitrator;

(ii) that the rights and procedures used in the mechanism comply with federal regulations promulgated by the federal trade commission relating to informal dispute settlement mechanisms; and

(iii) that the remedies set forth under subdivision (c) of this section are awarded if, after a reasonable number of attempts have been undertaken under subdivision (d) of this section to conform the vehicle to the express warranties, the defect or nonconformity still exists.

(2) The following notice shall be provided to consumers and arbitrators and shall be printed in conspicuous ten point bold face type:

NEW CAR LEMON LAW BILL OF RIGHTS

(1) IN ADDITION TO ANY WARRANTIES OFFERED BY THE MANUFACTURER, YOUR NEW CAR IS WARRANTED AGAINST ALL MATERIAL DEFECTS FOR EIGHTEEN THOUSAND MILES OR TWO YEARS, WHICHEVER COMES FIRST.

(2) YOU MUST REPORT ANY PROBLEMS TO THE MANUFACTURER, ITS AGENT, OR AUTHORIZED DEALER.

(3) UPON NOTIFICATION, THE PROBLEM MUST BE CORRECTED FREE OF CHARGE.

(4) IF THE SAME PROBLEM CANNOT BE REPAIRED AFTER FOUR OR MORE ATTEMPTS, OR IF YOUR CAR IS OUT OF SERVICE TO REPAIR A PROBLEM FOR A TOTAL OF THIRTY DAYS DURING THE WARRANTY PERIOD, YOU MAY BE ENTITLED TO EITHER A COMPARABLE CAR OR A REFUND OF YOUR PURCHASE PRICE, PLUS LICENSE AND REGISTRATION FEES, MINUS A MILEAGE ALLOWANCE ONLY IF THE VEHICLE HAS BEEN DRIVEN MORE THAN 12,000 MILES.

(5) A MANUFACTURER MAY DENY LIABILITY IF THE PROBLEM IS CAUSED BY ABUSE, NEGLECT, OR UNAUTHORIZED MODIFICATIONS OF THE CAR.

(6) A MANUFACTURER MAY REFUSE TO EXCHANGE A COMPARABLE CAR OR REFUND YOUR PURCHASE PRICE IF THE PROBLEM DOES NOT SUBSTANTIALLY IMPAIR THE VALUE OF YOUR CAR.

(7) IF A MANUFACTURER HAS ESTABLISHED AN ARBITRATION PROCEDURE, THE MANUFACTURER MAY REFUSE TO EXCHANGE A COMPARABLE CAR OR REFUND YOUR PURCHASE PRICE UNTIL THE FIRST RESORT OF THE PROCEDURE.

(8) IF THE MANUFACTURER DOES NOT HAVE AN ARBITRATION PROCEDURE, YOU MAY RESORT TO ANY REMEDY BY LAW AND MAY BE ENTITLED TO YOUR ATTORNEY'S FEES IF YOU PREVAIL.

(9) NO CONTRACT OR AGREEMENT CAN VOID ANY OF THESE RIGHTS.

(10) AS AN ALTERNATIVE TO THE ARBITRATION PROCEDURE MADE AVAILABLE THROUGH THE MANUFACTURER, YOU MAY INSTEAD CHOOSE TO SUBMIT YOUR CLAIM TO AN INDEPENDENT ARBITRATOR, APPROVED BY THE ATTORNEY GENERAL. YOU MAY HAVE TO PAY A FEE FOR SUCH AN ARBITRATION.

CONTACT YOUR LOCAL CONSUMER OFFICE OR ATTORNEY GENERAL'S OFFICE TO FIND OUT HOW TO ARRANGE FOR INDEPENDENT ARBITRATION.

(3) All informal dispute settlement mechanisms shall maintain the following records.

(i) the number of purchase price and lease price refunds and vehicle replacements requested, the number of each awarded in arbitration, the amount of each award and the number of awards that were complied with in a timely manner;

(ii) the number of awards where additional repairs or a warranty extension was the most prominent remedy, the amount or value of each award, and the number of such awards that were complied with in a timely manner;

(iii) the number and total dollar amount of awards where some form of reimbursement for expenses or compensation for losses was the most prominent remedy, the amount or value of each award and the number of such awards that were complied with in a timely manner; and

(iv) the average number of days from the date of a consumer's initial request to arbitrate until the date of the final arbitrator's decision and the average number of days from the date of the final arbitrator's decision to the date on which performance was satisfactorily carried out.